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Published in:
Brooklyn Journal of International Law

Link to publication

Citation for published version (APA):
Ferdinandusse, W. N. (2003). Out of the Black-box?: the international obligation of state organs. Brooklyn Journal of International Law, 29, 45-127.

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OUT OF THE BLACK-BOX? THE INTERNATIONAL OBLIGATION OF STATE ORGANS

Ward Ferdinandusse[*]

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* LL.M., Ph.D. Candidate, Amsterdam Center for International Law, University of Amsterdam. Visiting Researcher, Hauser Global Law School Program, New York University (Spring 2003). I owe thanks to many people for useful comments, suggestions and information, including my colleagues in Amsterdam, in particular André Nollkaemper, as well as Warda Henning, Benedict Kingsbury, Martti Koskenniemi, Mattias Kumm, Patrick McFadden, Cesare Romano, Mason Weisz, Ekow Yankah and the participants in New York University's JSD Colloquium. I also thank the *Brooklyn Journal of International Law's* staff and gratefully acknowledge the financial support of the Fulbright Foundation, the Netherlands Organization for Scientific Research and the Amsterdam University Fund. This Article was written in the context of the ACIL's research project: Interactions between International Law and National Law. Contact: ferdinandusse@jur.uva.nl or www.jur.uva.nl /acil.

1. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 2001), *reprinted in* 40 I.L.M. 1069 (2001), *available at* http://www.icj-cij.org/icjwww/idocket /igus/igusjudgment/igusijudgment_20010625.htm (last visited Oct. 17, 2003).

2. Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62 (April 29) [hereinafter *Cumaraswamy*].

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I. INTRODUCTION

Do international legal obligations only bind States,[3] as monolithic entities, or do they also oblige their State organs? This distinction poses an important question because, *inter alia*, a sense of direct obligation can lead State organs to respect international norms and, thus, may increase international law's effectiveness worldwide.[4] While many international law scholars assume that international obligations bind the State, but not its organs, an increasing amount of case law from international courts now challenges this assumption.

On March 3, 1999, the International Court of Justice ("ICJ") indicated provisional measures against the United States ("U.S.") at the request of Germany, to halt the pending execution of Walter LaGrand in Arizona.[5] After explicitly noting that "the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the [U.S.],"[6] the Court indicated *inter alia* that "*(a)* The [U.S.] should take all measures at its disposal to ensure that Walter LaGrand is not

3. Throughout this article, the capitalized term "State" will refer to the nation-state (e.g., Malaysia), and "state" to states in a union (e.g., Arizona), except where citations require otherwise.

4. *See* Philip Allott, *State Responsibility and The Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 14 (1988). As Phillip Allott observed:

> The moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility, which it entails. The moral discontinuity between the personal obligations of the government official and the obligations of the government is the cause and effect of the legal discontinuity between international law and municipal law. These discontinuities sustain each other.

Id. *See also* ANDRÉ NOLLKAEMPER, DE DIALECTIEK TUSSEN INDIVIDUELE EN COLLECTIEVE AANSPRAKELIJKHEID IN HET VOLKENRECHT [THE DIALECTIC BETWEEN INDIVIDUAL AND COLLECTIVE RESPONSIBILITY IN INTERNATIONAL LAW] 8–10 (2000) [hereinafter NOLLKAEMPER] (on file with the Brooklyn Journal of International Law); A.J.P. Tammes, *The Binding Force of International Obligations of States for Persons Under Their Jurisdiction*, *in* DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE 57, 59 (R.J. Akkerman et al. eds., 1977) ("The international community must consider it a reinforcement of general international law that subordinates are bound separately from the comprehensive bodies, and are not just submerged in their shadow.").

5. *See LaGrand*, 2001 I.C.J. 104.

6. *Id*. at para. 16.

executed pending the final decision in these proceedings" and "*(b)* the [U.S.] Government…should transmit this Order to the Governor of the State of Arizona."[7]

The ICJ's finding in *LaGrand* stands at odds with the dominant view in international law, which envisages the State as a black-box. Under this theory, international law can insert its demands in the box, requiring certain results to come out of it; however, it cannot determine how these results are reached within the box. Thus, under black-box theory, the State must ensure that its organs comply with its international obligations.[8] Accordingly, the ICJ would have had to limit its findings to address U.S. obligations instead of also determining the Governor of Arizona's responsibilities. Indeed, the ICJ normally only pronounces on States' international obligations, not State organs.

Like *LaGrand*, many other cases exist that contradict black-box theory and assume that State organs directly hold obligations under international law, independent of any national reception. In fact, a rich line of national case law exists in this respect.[9] This Article will provide an overview of relevant in-

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7. *Id*.

8. *See* Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, at 44–45 (1995). Patrick McFadden explains that:

> [Black-box] theory conceives international law as imposing its obligations only on each state as a whole, and not on any of its constituent organs. It is a matter for each state to determine which of its organs shall execute the nation's international responsibilities, and each of these organs, consequently, must await an internal signal to operate.

Id.

9. *See generally* Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication, in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: FESTSCHRIFT FÜR RUDOLF BERNHARDT [LAW BETWEEN CHANGE AND CONSERVATION: LIBER AMICORUM RUDOLF BERNHARDT] 687 (Ulrich Beyerlin et al. ed., 1995) [hereinafter Buergenthal, *International Tribunals*]; BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS (René Provost trans., 1993) [hereinafter CONFORTI, INTERNATIONAL LAW]; ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti & Francesco Francioni eds., 1997); Rosalyn Higgins, *Dualism in the Face of a Changing Legal Culture*, *in* JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE, LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY 9 (Gordon Slynn Hadley et al. eds., 2000) [hereinafter Higgins, *Dualism*]; Rosalyn Higgins, *The Concept of "The State": Variable Geometry and Dualist Perceptions*, *in* INTERNATIONAL LEGAL SYSTEM IN QUEST

ternational case law and will argue that international courts' (recent) involvement strengthens the challenge to black-box theory. In addition, this Article will argue that this challenge is both evidence and a consequence of the changing character of international law. The concept of State organ obligation will improve compliance with international law, but will also make international law's deficiencies a more pressing problem.

The question of whether international obligations directly bind State organs has practical relevance in a multitude of ways. First, this issue may influence national authorities' will-

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OF EQUITY AND UNIVERSALITY: LIBER AMICORUM GEORGES ABI-SAAB 547 (Georges Abi-Saab et al. eds., 2001) [hereinafter Higgins, *The Concept*]; INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996) [hereinafter DECISIONS]; Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. J. INT'L L. & ECON. 555, 555 (2002); Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State'*, 5 EUR. J. INT'L L. 423 (1994) [hereinafter Benvenisti, *Judges and Foreign Affairs*]; Benedetto Conforti, *Notes on the Relationship Between International and National Law*, 3 INT'L L.F. 18 (2001) [hereinafter Conforti, *Notes*]; Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 EUR. J. INT'L L. 51 (1999); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 501–02 (2000); Felice Morgenstern, *Judicial Practice and the Supremacy of International Law*, 27 BRIT. Y.B. INT'L L. 42 (1951); Justice Michael Kirby, Law & Justice Foundation of New South Wales: Justice Kirby's Papers, *at* http://www.lawfoundation.net.au/resources/kirby/ (last visited Sept. 10, 2003); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 100 (1994); *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2049 (2001). *See also Miscellaneous* (Bangalore Principles 4 and 7), *reported in* 14 COMMONWEALTH L. BULL. 1196, 1197 (1988). According to the Bangalore principles:

> [T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete….It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

Id.

ingness to comply with international law, either directly or indirectly, through public pressure.[10] That this matter can be one of life or death was demonstrated when the Governor of Texas announced that he did not feel legally obliged to obey the ICJ's February 5, 2003 Order to stay the execution of two Mexican prisoners on death-row in Texas.[11] Second, international courts' determinations that State organs should heed the call of international law, regardless of national implementation, can also provide inspiring examples for litigation in U.S. courts, especially in human rights cases. Third, international law's effect on State organs also underlies many practical issues regarding national legal orders in general. For example, to what extent should courts defer to the executive branch in determining whether treaties are self-executing?[12] Is the *male captus bene detentus* principle viable?[13] The suggestion that *jus cogens* norms may bind national courts, in defiance of the normal implementation framework, forms a particular example of State organ obligation that challenges black-box theory.[14]

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10. *See* Douglas Cassel, *Judicial Remedies for Treaty Violations in Criminal Cases: Consular Rights of Foreign Nationals in United States Death Penalty Cases*, 12 LEIDEN J. OF INT'L L. 851, 855 (1999) [hereinafter Cassel, *Judicial Remedies*].

11. *See infra* note 130.

12. *See generally* Jean-Marie Henckaerts, *Self-Executing Treaties and the Impact of International Law on National Legal Systems: A Research Guide*, 26 INT'L J. OF LEGAL INFO. 56–159 (1998).

13. *See* Paul Mitchell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 392 (1996) ("[A]s a matter of international law domestic courts must ensure that a state's international legal obligations are carried out. Accordingly, courts are under a duty to stay proceedings against a fugitive who has been brought before them in violation of international law. The existence of this duty is the central issue….").

14. *See, e.g.*, U.S. v. Matta-Ballesteros*,* 71 F.3d 754, 764 n.5 (9th Cir. 1995) ("Kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law."); Comm. of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988). The Court explained:

> When our government's two political branches, acting together, contravene an international legal norm, does this court have any authority to remedy the violation? The answer is "no" if the type of international obligation that Congress and the President violate is either a treaty or a rule of customary international law. If, on the other hand,

This Article's primary agenda, however, is not simply to show exceptions to black-box theory, but to challenge its accuracy as the default rule in international law. It is well known and increasingly recognized that there are certain phenomena in the reception of international law for which the theory cannot account.[15] Nevertheless, despite all of its shortcomings, the black-box theory remains pervasive in theory and practice, as this Article will demonstrate later. Scholars tend to treat divergent phenomena as proverbial exceptions that confirm the rule, instead of evidence that the theory requires revision. This Article will focus on how international law discourse still considers State organ obligation as a predominantly alien concept and will show how the theory may change from the rule to the exception.

This Article will move from a high level of generality to a more specific discussion of the issues involved. First, the Article will provide a concise exposition of black-box theory and its acceptance in practice, taking a top-down perspective of international law that does not concern itself with specific international obligations (e.g., treaty or custom)[16] or the State organs involved (e.g., parts of a federation or of an internal separation of powers in legislative, executive and judicial organs).[17] Accordingly, while this Article will focus mostly on courts, the

> Congress and the President violate a peremptory norm (or *jus cogens*), the domestic legal consequences are unclear.

Id. *See generally* Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. (forthcoming 2004) (on file with author).

15. *See* McFadden, *supra* note 8, at 46–47.

16. *Cf*. THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 125 (James Crawford ed., 2002) [hereinafter ILC ARTICLES ON STATE RESPONSIBILITY] (Article 12 states: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.").

17. *See id.* at 94. As Article 94 states:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

Id.

term "State organ" should be understood in a broad sense and in principle can include any entity or actor exercising State authority, be it a state in a union, province, city, agency, organ or official.[18] As this Article will explain shortly, the black-box theory is deeply embedded in international law. Therefore, it is important to first challenge the categorical assertion that international obligations cannot bind State organs directly before refining our understanding of the concept. While perhaps a rather abstract approach, this type of analysis provides a clear overview of the black-box theory's broad grip on international obligations of all sorts. In a similar manner, this Article will then set out the arguments against black-box theory using a broad overview of divergent case law.

The analytical section will then become more specific as it will focus in on the different causes, problems and consequences of State organ obligation. Clearly, whether a *particular* international obligation binds a *particular* State organ will depend largely on its source (e.g., treaty or decision of an international court), character (e.g., positive or negative obligation, obligation of result or obligation of conduct), content and wording. Similarly, important differences exist, for example, between territorial units and courts. Moreover, international obligations do not bind all State organs. This Article's focus, however, is on issues relevant to different State organs' obligations, including federalism and the democratic legitimacy of the international obligations involved, and its focus will be thus limited.

Part II will shortly dwell on the black-box theory's current status, the practical relevance of State organ obligation, and the limited relevance of the non-self-executing character of certain treaty provisions. After an exposé of relevant case law in Part III, this Article will provide an analysis in Part IV that is divided into three sections. The first section will focus on the material changes in international law and their consequences for black-box theory. The second section will lay out its own reading of the model of State organ obligation that may replace the black-box theory. The third will then address some policy considerations, including issues of federalism, separation of powers

18. Arguably, private actors or entities exercising authority on behalf of the State (such as private corporations running prisons) could be considered to have similar obligations under international law as State organs.

and democratic legitimacy. Finally, Part V concludes this Article's analysis of black-box theory, explaining that the trend towards State organ obligation is real, developing and important.

II. BLACK-BOX THEORY IN INTERNATIONAL LAW

The black-box theory has a long history in international legal scholarship,[19] and is undoubtedly the dominant theory at this time. Academia has taught generations of lawyers that international law binds the State, but not its organs.[20] Most academics consider exceptions possible, but only by State choice, not because of international law's normative power. For example, States can choose to "open the box" by virtue of a general reference to international law in their nation's constitution.[21] As a

19. The question of State organ obligation is closely connected to the longstanding debate between monists and dualists. *See* GIORGIO GAJA, DUALISM IN MODERN INTERNATIONAL LAW 15 (2003) (Seminars on Theoretical Approaches to The Relationship between International and National Law, *available at* http://www1.jur.uva.nl/acil/pionier/Seminars_on_theoretical_approaches_to_the.htm) (last visited Apr. 9, 2003) [hereinafter GAJA] ("[D]ualists consider State organs to be sheltered from international law, which becomes relevant in the State organs' perspective only by means of a rule pertaining to the municipal law system."); Karl Josef Partsch, *International Law and Municipal Law*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 238, 242 (Rudolf Bernhardt ed., 1992). As Karl Josef Partsch explains:

> The doctrine that the international legal order has to be clearly distinguished from the legal order of States has led to the concept that the validity of international law on the municipal plane is always based on the authority of the State and that it is therefore necessary to transform the norms of international law into internal law in order to make them binding on State organs (courts or administrative agencies) or also possibly on individuals.

Id. Descriptions of this debate can be found in any textbook. *See also* Andrzej Wasilkowski, *Monism and Dualism at Present*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSKI 323–36 (Jerzy Makarczyk ed., 1996).

20. *See, e.g.*, Gerald Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of The Rule of Law,* 92 REC DES COURS (LA HAYE) 5, 77 (1957 II) ("The truth is, that the concept of the State or nation *as an indivisible entity* possessing its own separate personality, is a necessary initial hypothesis, which has to be made before it is possible to speak significantly of international law at all, and which is implied by the very term '*inter*-national.'").

21. *See* Rainey v. United States, 232 U.S. 310, 316 (1914) ("Treaties are contracts between nations, and by the Constitution are made the law of the land."). As Gerald Fitzmaurice notes:

result, State organs may find themselves bound by international obligations. However, such obligations of individual organs are left to the discretion of the State, and are revocable at all times.[22] From the standpoint of international law under black-box theory, State organs are simply invisible.[23]

Surely, the black-box theory is not undisputed. It has received strong opposition from eminent scholars like Hersch Lauterpacht.[24] Among contemporary scholars, the black-box theory has drawn fierce and principled critiques,[25] more nu-

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> [T]he government, régime, head of State, etc. are merely organs of the State and are not the State itself, they are the agents of the State for carrying out its international obligations. These are not vested in them as organs, but in the State they represent, though, under the State's constitution, the responsibility for carrying out the State's obligations may attach to them.

Fitzmaurice, *supra* note 20, at 90–91.

22. *See, e.g.*, Francis G. Jacobs, *Introduction*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW xxiii, xxiv (Francis G. Jacobs & Shelley Roberts eds., 1987). Francis Jacobs elaborates on the notion of State discretion as follows:

> [T]he effect of international law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law. The fundamental principle is that the application of treaties is governed by domestic constitutional law. It is true that domestic law may, under certain conditions, require or permit the application of treaties, which are binding on the State, even if they have not been incorporated into domestic law. But this application of treaties "as such" is prescribed by a rule of domestic constitutional law. It is not a situation reached by the application of a rule of international law, since such a rule, to have effect, itself depends upon recognition by domestic law.

Id.

23. NOLLKAEMPER, *supra* note 4, at 7.

24. INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT: VOL. I — THE GENERAL WORKS 280 (Elihu Lauterpacht ed., 1970) ("To say that the State — and the State only — is the subject of international duties is to say…that international duties bind no one; it is to interpose a screen of irresponsibility between the rule of international law and the agency expected to give effect to it.").

25. *See, e.g.*, Conforti, *Notes*, *supra* note 9, at 18 and 21–23. Conforti explains:

> In all my contributions on the integration of public international law into the domestic legal orders I have always argued that international rules…should be treated on the same footing as unilateral municipal law.…The old opinion that international rules had only states as their addresses, that only diplomats were to deal with them, and

anced "problematization,"[26] as well as simple denials without elaboration.[27] Moreover, scholars have widely acknowledged that the theory has never been able to fully account for the complex and divergent practice of domestic implementation of international law.[28] For example, the international obligation of States to refrain from defeating the object and purpose of a treaty before its entry into force would have to bind State organs directly in order to gain meaningful force.[29] A moderating role of national law is hardly feasible in this respect, as the obligation serves a preliminary and temporary role — one meant to precede the treaty's operation and implementation through national law.[30]

> that international law was a subject to be studied in the Faculties of Political Science rather than in the Law Faculties, is completely abandoned more or less in all countries.…Are state officials bound by the "international" interpretation of an international rule? It is clear that the interpretation embodied in binding international decisions is binding with regard to the specific case brought before the international body.

Id. Pierre Pescatore, *Conclusion*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW 281–82 (Francis G. Jacobs & Shelley Roberts eds. 1987) [hereinafter Pescatore, *Conclusion*] (arguing that requiring the transformation of international obligations allows states to abstain from internal execution and deprives treaties from their contractual and international character; as a result "incorporation procedures and methods based on 'transformation' are…by their very essence incompatible with good faith in international relations.").

26. *See, e.g.*, André Nollkaemper, *The Direct Effect of Public International Law*, *in* DIRECT EFFECT: RETHINKING A CLASSIC OF EC LEGAL DOCTRINE 157 (Jolande M. Prinssen & Annette Schrauwen eds., 2002).

27. *See, e.g.*, Karl Zemanek, *The Legal Foundation of The International System: General Course on Public International Law*, 266 REC DES COURS (LA HAYE) 9, 191 (1998) ("[I]n theory, Parliaments as State organs are bound to interpret international treaties in accordance with the rules embodied in the [Vienna Convention on the Law of Treaties.]"); *see also* Danilenko, *supra* note 9, at 54 ("Although international norms bind all branches of government, domestic courts probably constitute the most important organs for the implementation of international norms at the domestic level.").

28. *See supra* notes 9, 16.

29. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336.

30. *See* Unity Dow v. Attorney-General of Botswana [1992] L. Rep. Commonwealth 623, 673, *available at* www.law-lib.utoronto.ca/diana/cases.htm (last visited Oct. 5, 2003). In *Unity Dow*, a domestic court struck down discriminatory legislation on the basis of unincorporated treaties, noting that it was "bound to accept the position that [Botswana] will not deliberately enact laws in contravention of its international undertakings and obligations." *Id*.

But despite these caveats, black-box theory still reigns as the all-pervasive theory in international law. International scholars accept the black-box theory as the default rule, which cannot easily be set aside. Leading textbooks, while not insensitive to the changes in international law, still advance the position, explicitly or implicitly, that it is up to the State to determine the binding force of international obligations on its organs.[31] Most scholars understand even the fact that customary interna-

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31. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL LAW 168 (2001). Antonio Cassese specifically points out that:

> States consider…the translation of international commands into domestic legal standards [as a] part and parcel of their sovereignty, and are unwilling to surrender it to international control. National self-interest stands in the way of a sensible regulation of this crucial area. As a consequence each State decides, on its own, how to make international law binding on State agencies and individuals and what status and rank to assign to it in the hierarchy of municipal sources of law.

Id.; LOUIS HENKIN, INTERNATIONAL LAW: CASES AND MATERIALS 149, 153 (West Publishing Co. 1993)

> The international obligation is upon the state, not upon any particular branch, institution, or individual member of its government….Since a state's responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic courts apply and give effect to international obligations.

Id.; L. OPPENHEIM ET AL., OPPENHEIM'S INTERNATIONAL LAW 85 (Sir Robert Jennings ed., 9th ed. Longman Group UK Lmtd. 1992) ("The obligation is the obligation of the state, and the failure of an organ of the state, such as a Parliament or a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations."); ALFRED VERDROSS & BRUNNO SIMMA, UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS 539–40 (Duncker & Humblot eds., 1984) ("[International law] überträgt seine Durchführung den verpflichteten Staatten, die es durch ihre Organen zur Anwendung zu bringen haben.…Bezweckt eine Völkerrechtsnorm Rechtswirkungen im innerstaatlichen Bereich, so muß ihr Inhalt in die innerstaatliche Rechtsordnung eingeführt ('inkorporiert') werden, um durch die staatlichen Organe erfüllt werden zu können." ["International law delegates its effectuation to the obliged States, which are to execute it through their organs.…If a norm of international law has the purpose of taking legal effect within the State, its content must be introduced (incorporated) in the national legal order to enable State organs to comply with it."]). *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31–56 (Clarendon Press, Oxford 1998) ("In principle decisions by organs of international organizations are not binding on national courts without the cooperation of the internal legal system.").

tional law becomes binding on State organs from the moment of its conception in most, if not all, countries to result from a permissive rule of national law and not from the normative force of the customary law itself.[32]

The acceptance of black-box theory permeates doctrine and practice, both national[33] and international.[34] It is evidenced ex-

32. *See* CASSESE, *supra* note 31, at 172. However, the fact that courts in a great many States apply customary international law without a corresponding provision in national law seems to argue for State organ obligation rather than black-box theory. Indeed, the famous statements in *The Paquete Habana* and the history of the application of international law in the U.S. support that view. *See* The Paquete Habana, 175 U.S. 677, 700, 708 (1900). In *The Paquete Habana*, the U.S. Supreme Court noted that:

> International law is part of [U.S.] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.…This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Id. *See also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 863–885 (Part II: "International Law in United States Law").

33. *See, e.g.*, McFadden, *supra* note 8, at 45 ("Black-box theory made an early appearance in American jurisprudence and has remained a common feature of judicial reasoning to this day.").

34. *See, e.g.*, Ballantyne, Davidson and McIntyre v. Canada, HRC Communications Nos. 359/1989 and 385/1989, views adopted on March 13, 1993, 47th Session (1993), *cited in* Higgins, *The Concept*, *supra* note 9, at 548. In *Ballantyne*, the applicants complained to the Human Rights Committee that a prohibition by the province of Quebec to use the English language in advertising violated their rights under the International Covenant on Civil and Political Rights ("ICCPR"). While finding a violation of Article 19, the Committee did not find a violation of Article 27 (minority rights):

> As to Article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the "State" or to "States" in the provisions of the Covenant, to ratifying States…. Accordingly, the minorities referred to in Article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus entitled to the benefits of Article 27. English speaking citizens of Canada cannot be considered a linguistic minority.

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plicitly in treaty practice, for example, by federalism clauses that limit the obligations to the central State.[35] Various treaties contain provisions that, similar to a federalism clause, assume a lack of obligation on the part of (certain) State organs.[36] Likewise, many scholars consider that international law does not govern international agreements between State organs, such as those between states in a union or provinces.[37] It is especially

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> The authors therefore have no claim under Article 27 of the Covenant.

Id. at para. 11.2. Thus, the Committee adopted a narrow reading of the word State in the ICCPR, which excludes their constituent parts, such as a province like Quebec. Accordingly, the Committee called on Canada to remedy the violation of Article 19 "by an appropriate amendment of the law." *Id*. at para. 13. The Committee addressed Canada even though it was clear that such an amendment would have to be passed by the provincial government of Quebec.

35. *See, e.g.*, Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, art. 34, 1037 U.N.T.S. 152, 161.

36. *See, e.g.*, Draft Supplemental Agreement Between the United States of America and the European Police Office on the Exchange of Personal Data and Related Information, Nov. 4, 2002, art. 7, *available at* http://www.statewatch.org/news/2002/nov/12eurosagmt.htm (last visited Sept. 2, 2003). In particular, Article 7 states:

> Authorities competent to receive information:
>
> > (a) Information supplied by Europol under this Agreement shall be available to competent U.S. federal authorities for use in accordance with this Agreement.
> >
> > (b) Such information shall also be available for use by competent U.S. state or local authorities provided that they agree to observe the provisions of this Agreement, in particular Article 5, paragraph 1.

Id.

37. *See* Eyal Benvenisti, *Domestic Politics and International Resources: What Role For International Law?*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 109, 126 (Michael Byers ed. 2000). As Eyal Benvenisti explains:

> Current doctrine seems to suggest that [sub-State] agreements will not be governed by international law, but rather by one or a number of national laws. This doctrine is derived from two principles: first, the principle of unity of action of the State at the international level; and second, the lack of legal personality of sub-State entities in the international sphere.

Id. However, a clear contrary practice exists in this regard. Hong Kong, a special administrative region of the People's Republic of China, participates in "more than forty international organizations and associations" and is party to hundreds of treaties, both bilateral and multilateral. RODA MUSHKAT, ONE

telling that even initiatives for reform that aim at more effective adjudication of international law at the national level are often drafted presuming black-box theory.[38]

Thus, we learn to see the State as a walled town. International law can lay siege to the town from the outside, forcing the

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COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 8–9 (Hong Kong University Press 1997). *See also* Cheung v. United States, 213 F.3d 82 (2d Cir. 2000) (finding that an extradition treaty with a sub-sovereign like Hong-Kong is a valid treaty under the federal extradition statute). The 1991 Mexican Law Regarding the Making of Treaties regulates so-called "inter-institutional agreements" and defines them in Article 2 subsection II as:

> [A]n agreement governed by public international law, entered into in writing between any centralized or decentralized agency of the Federal, State or Municipal Public Administration and one or more foreign governmental agencies or international organizations, whatever its denomination, and without regard to whether or not it arises out of a previously approved treaty. Inter-institutional agreements must be strictly circumscribed by the scope of authority of the above-mentioned agencies that may execute them on respective levels of government.

CDLX Diaro Official de la Federacion 2 (Jan. 2, 1992) (Mex.). The law also allows "Mexican legal entities" to participate in international dispute settlement (Article 8), which seems to affirm the reading that "inter-institutional agreements are only binding upon those agencies which have entered into them, not upon the Federation." *See* Mexico: Law Regarding the Making of Treaties, Dec. 21, 1991, 31 I.L.M. 390 (entered into force Jan. 3, 1992) (introductory note by Antonio Garza Canovas). *See also* Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 REC DES COURS (LA HAYE) 9, 114 (1999) [hereinafter Tomuschat, *International Law*] ("[T]he character of an instrument concluded by a constituent unit of a federal State as an instrument governed by international law should not be put into doubt."); FEDERATED AND REGIONAL ENTITIES AND INTERNATIONAL TREATIES, REPORT ADOPTED BY THE VENICE COMMISSION, Dec. 10, 1999, CDL-INF (2000) 3, *available at* www.venice.coe.int/docs/2000/CDL-INF(2000)003-e.html (last visited Oct. 5, 2003) (seven out of the thirteen States responding to the global survey — Argentina, Austria, Belgium, Bosnia and Herzegovina, Denmark, Germany and Switzerland — allow sub-State entities to conclude international treaties, generally including multilateral ones); Nicolas Schmitt, *The Foreign Relations of Swiss Cantons*, *in* FEDERALISM AND MULTIETHNIC STATES: THE CASE OF SWITZERLAND 131, 141 (Lidija R. Basta & Thomas Fleiner–Gerster eds., 1996).

38. *See Resolution of the Institut de Droit International* (1993 Milan) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 65 art. 1, 321 ("National courts should be empowered by their domestic legal order to interpret and apply international law with full independence."). *See also* the 1988 Bangalore principles, *supra* note 9.

State to bring about certain results; however, it cannot control how these results will be accomplished or who will act within the walled town. Even detailed international obligations that specify the means and organs through which desired results are to be achieved do not impose themselves directly on the designated organs, but rather oblige the State to put those specific organs to work.[39] In the absence of such delegation to specific organs by the State, the "town walls" serve to blockade international law's reach.

In order to fully comprehend the relevance of State organ obligation, it is necessary to clearly distinguish between international obligations and related questions, such as the obligation's rank in the national legal order and its international enforcement through State responsibility. Treating these questions as one all-encompassing topic obscures the fundamental importance of the obligation itself,[40] even though it often seems logical to discuss legal obligation in conjunction with enforcement. For example, one can argue that as long as the State remains the relevant unit for the ultimate enforcement of international obligations, which takes place at the international level, the question of whether State organs have parallel obligations to that of the State proves irrelevant. What does it matter whether the Governor of Arizona has an international obligation if it is the U.S. that will appear before the ICJ in case of a breach?[41]

Similarly, it is often assumed that the effect of international obligations on organs within a State is only relevant if the in-

39. *See* Fitzmaurice, *supra* note 20, at 68–69 ("[W]hen it is said that international law in a number of ways prescribes what States must do or not do in their own territory, this does not mean that international law has, as such, direct and immediate application in State territory."). *Cf.* Lord Denning MR *in* Blackburn v. Attorney-General, 1 W.L.R. 1037 (C.A. 1971) ("Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.").

40. *Cf.* Yoram Dinstein, *The Implementation of International Human Rights*, *in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: FESTSCHRIFT FÜR RUDOLF BERNHARDT [LAW BETWEEN UPHEAVAL AND PRESERVATION: AN ANNIVERSARY PUBLICATION FOR RUDOLF BERHARDT] B.331, 334 (Ulrich Beyerlin ed., 1995) ("The enormity of the problem of the implementation of international human rights must not detract from the importance of the threshold issue whether these human rights exist at all.").

41. Part IV.B. of this Article will revisit the relationship between State organ obligation and State responsibility.

ternational norms can trump national law. In fact, Professor John Rogers, in his analysis of U.S. case law, states that U.S. courts and judges do not apply public international law *ipso facto*,[42] specifically noting that:

> In the statutory interpretation context, even [in] the most extreme application of the Rule of Interpretation,…the court [has been] careful to state that the Congress [can] legislate in contravention of international treaty obligations of the [U.S.], if only the words of Congress were clear enough.…The universal assumption is thus incontrovertibly "dualist" in the sense that *in* [*U.S.*] *courts*, public international law is [U.S.] law *only* if something in [U.S.] law makes it so.[43]

This analysis of international law's application in the U.S. clearly steps too far. The fact that congressional legislation can override treaty law in the U.S. is not an argument against the binding power of treaties on the courts under international law. It is merely a limitation of the practical effect of a treaty's bindingness. After all, courts, as State organs, will generally follow the instructions of national law in resolving conflicts between national and international rules. Lack of supremacy, nevertheless, fails to render the question of State organs' international obligations as superfluous.

Rather, a "sanctionist" perspective on international law develops by connecting the question of obligation to enforcement or hierarchy. Such an analysis concentrates the discussion on cases where international obligations are breached or conflict with national law (or both). This type of analysis, however, only portrays a part of the story. Often, States simply comply with international obligations, discarding the need for external enforcement. Similarly, international obligations can be effective without directly confronting national law.[44] In *LaGrand*, it was open to both the Governor of Arizona[45] and the U.S. Supreme

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42. JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 73 (Dartmouth Pub. Co. Ltd. & Ashgate Pub. Co. 1999).

43. *Id.*

44. For example, when Courts apply and interpret national law in conformity with international law. *See, e.g.*, *infra* note 321.

45. In fact, the U.S. acknowledged this point in the case's final proceedings before the ICJ. *See LaGrand*, 2001 I.C.J. 104, para. 95.

Court,[46] under national law, to grant a stay of the execution and, thus, ensure compliance with the Order of the ICJ.[47] A sufficient sense of obligation under international law might well have compelled them to do so.

Some commentators mainly focus on the necessity of an internationalist attitude of State organs, discarding international law's bindingness as a theoretical issue that is of little effect for everyday practice.[48] Although the importance of State organs' cooperative attitude is beyond doubt,[49] a far-reaching relativization of the bindingness of international obligations on State organs is misplaced and counter-productive. Certainly it is overly optimistic to first imprint lawyers during their education with the idea that international law has no place of its own within the State and then expect them to vigorously uphold (unincorporated) international obligations during the rest of their careers. Relativizing the formal status of international obliga-

46. *See* Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 711 (1998).

47. *LaGrand*, 2001 I.C.J. 104, para. 32.

48. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. OF INT'L L. 675, 792 (2003) ("Rather than debate whether international tribunal decisions are binding or not, a far more fruitful inquiry is to consider the continuum of deference accorded to international tribunals, with national courts granting varying degrees of respect depending on the circumstances presented."). *Cf., e.g.*, Conforti, *Notes*, *supra* note 9, at 18. As Conforti asserts:

> [The position of international rules in the domestic legal order] is not a question of adopting a monistic rather than a dualistic approach. This is a theoretical question with no practical implications, which can be left in the hands of philosophers. It is rather a question of a change in the mentality of people involved in legal affairs, especially legislators, public administrators and judges. It is a question of persuading this people to use all means and mechanisms provided by municipal law, and to perfect them, in order to ensure compliance with international rules.

Id.

49. *See* Higgins, *The Concept*, *supra* note 9, at 552 ("Pragmatism and a cultural disposition to comply with international obligations have led to ways being found for a state to secure compliance with such obligations even when, constitutionally, it seems that the state concerned lacks the necessary powers.").

tions is not likely to convince nationalist skeptics that they should pay more attention to international law in practice.[50]

Breaking away from the sanctionist perspective exposes the importance of the question of State organ obligation. The binding nature of these obligations is an important factor in the internalization, and thus effectuation of the law.[51] It can also be an effective argument in bringing public pressure on State organs to comply with international obligations in concrete cases.[52]

This question takes on further significance where the central government has no formal power to compel an organ to comply with international law, as may be the case with courts and states in a union. A telling example is found in the 1972 judgment of the European Court of Human Rights ("ECHR") in *Tyrer v. United Kingdom*.[53] In this case, the ECHR held the United Kingdom in breach of Article 3 of the European Convention for the practice of judicial corporal punishment on the Isle of Man.[54] Nevertheless, the Manx legislature refused to alter its law on judicial corporal punishment, and the United Kingdom's government could neither compel nor persuade it.[55] Eventually, a change in the Isle of Man High Court's case law led to a vol-

50. *See* Helfer & Slaughter, *supra* note 9, at 304–07. *Cf.* Jochen A. Frowein, *The Implementation and Promotion of International Law through National Courts*, *in* INTERNATIONAL LAW AS A LANGUAGE FOR INTERNATIONAL RELATIONS 85, 92–93 (United Nations Pub., 1996) [hereinafter Frowein, *The Implementation*] ("The slogan, 'international law forms part of the law of the land,' first used by British judges very early on, has certainly had an enormous impact on the general attitude of lawyers in the countries which have adopted the rule.").

51. *See generally* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

52. State organs, when breaching international law, regularly deny the binding force of the obligation, thereby recognizing it as a relevant factor. *See, e.g.*, *LaGrand*, 2001 I.C.J. 104, at para. 33 (referring to the behavior of various U.S. organs); Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Request for the Indication of Provisional Measures) (Apr. 9) [hereinafter *Breard*] (involving issues similar to *LaGrand*, the execution of a foreign national in the U.S. despite provisional measures of the I.C.J.); *infra* Part III.A.1.

53. Tyrer v. United Kingdom, 2 Eur. Ct. H.R. 1 (ser. A) (1978), *cited*, along with similar cases, *in* Higgins, *The Concept*, *supra* note 9, at 550.

54. *Id.* at para. 39.

55. *Id.* at paras. 13–15.

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untary abrogation of the practice of corporal punishment.[56] In a case like this, it is crucial that the State organ recognizes the international obligation, as the Isle of Man Court did when the legislature would not. Otherwise, the State would need to change either its internal structure or its international obligations. This Article will revisit the practical effects of State organ obligation in more detail in Part IV.B.

Finally, the oft-debated question of the self-executing character of treaty provisions requires some comment at the outset. Limiting the domestic validity of treaties to those that are self-executing is essentially an avoidance doctrine under national law, allowing the courts to ignore certain international norms.[57] Some treaty provisions are surely imprecise or incomplete, but no rule of international law requires States to exclude these provisions from their national legal order altogether. Courts can very well apply all treaty provisions, and hold that non-self-executing provisions are domestically valid law, but too imprecise or incomplete to govern a specific case.[58]

Therefore, the mere fact that a treaty provision is labeled as a non-self-executing obligation under national law will in principle not prevent it from placing an international duty on State organs. At best, it may be indicative of a lack of precision or completeness, which precludes the provision from imposing such a duty. On the other hand, as may be inferred from our discussion of hierarchy above, a national rule prohibiting the application of non-self-executing provisions may well prevent courts from giving effect to their international obligations.[59] In this regard, the matter of self-execution is no different than any other avoidance doctrine in national law, such as the "political question" doctrine, the act of state doctrine or restrictions on the standing of individuals.

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56. *See* Higgins, *The Concept*, *supra* note 9, at 550.

57. The existence of declarations on the non-self-executing character of entire treaties and the fact that international judges and arbitrators regularly apply provisions that national courts deem non-self-executing evidence the national origin of the non-self-executing label.

58. *See* Danilenko, *supra* note 9, at 65 (stating that the Russian Constitutional Court does not distinguish between self-executing and non-self-executing treaties).

59. Obviously, this problem will lead to a breach of the international obligation.

III. DIVERGING PRACTICE: DECLINE OF BLACK-BOX THEORY?

Now that we have outlined the black-box theory and its acceptance in practice, we turn to the case law that challenges the view that State organs have no international obligations unless they are imposed by domestic law. This section starts with an inquiry of the ICJ and then proceeds to examine the practice of other international bodies.

A. The International Court of Justice

Because international law predominantly focuses on States as the relevant units, international courts are generally set-up to deal with States as unitary entities and not with their specific organs.[60] The principal function of the ICJ, like its predecessor, the Permanent Court of Justice, is to resolve disputes between States.[61] The obligation to comply with ICJ judgments is placed upon the parties participating in the proceedings.[62] While it is clear that this obligation binds the State as an entity, there is no consensus as to whether it obligates State organs.[63] Professor Shabtai Rosenne states that it "follows from the fact that the decision is binding upon the State as such that it is binding upon all the organs of the State."[64] Others believe that the obligation to comply is incumbent only upon the State as an entity, and that its organs "are not directly obliged by virtue of the judgment unless a direct obligation is provided for in the constitutional law of the State concerned."[65]

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60. Several courts now allow for the participation of individuals in addition to States. Partly as a consequence of this development, Courts, especially in Europe, have been able to force a direct relationship with State organs, although participation of State organs was not envisaged in the legal framework of these courts.

61. PHILLIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 338 (5th ed. 2001).

62. *See* U.N. CHARTER art. 94, para. 1; I.C.J. STAT. Art. 59 (June 26, 1945), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/basetext /istatute. htm#TOC (last visited Oct. 6, 2003).

63. *See* Sarita Ordóñez & David M. Reilly, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, *in* DECISIONS, *supra* note 9, at 335.

64. SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996, 221 (1997).

65. THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 1176 (Bruno Simma ed. 2002). *See generally* Mohammed Bedjaoui, *The Reception by Na-*

The question of State organ compliance also remains unresolved in practice. The duty of specific State organs to comply with ICJ judgments has received little treatment, and, in the U.S., generally negative treatment.[66] The Court itself has seldom, if ever, commented specifically on the position and obligations of State organs. Recently, however, that situation has changed.

1. *LaGrand*

In order to fully understand the proceedings before the ICJ in *LaGrand*, it is necessary to examine the case's background.[67] In the U.S., Arizona prosecuted and sentenced to death two German nationals, the brothers Karl and Walter LaGrand, without notifying them of their right to consular assistance under the Vienna Convention on Consular Relations.[68] In recent years, the U.S. has persistently violated this duty of notice.[69] This pattern of violations has drawn protests from several countries, especially in death penalty cases, and resulted in the issuance of an Advisory Opinion by the Inter-American Court of Human Rights.[70]

Shortly before *LaGrand*, the ICJ ordered provisional measures against the U.S. at the request of Paraguay in the case of Angel Breard, who had been sentenced to death in Virginia without receiving the notification required under the Vienna Convention.[71] The Order required the U.S. to "take all meas-

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tional Courts of Decisions of International Tribunals, 28 N.Y.U. J. INT'L L. & POL. 45 (1997).

66. *See* Douglas Cassel, *Judicial Remedies*, *supra* note 10, at 854, 887. *See also supra* note 53.

67. *See LaGrand*, 2001 I.C.J. 104, at paras. 13–34; Symposium, *Reflections on the ICJ's LaGrand Decision*, 27 YALE J. INT'L L. 423–52 (2002); Robert Jennings, *The LaGrand Case*, *in* 1 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 13 (2002).

68. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261.

69. *See* Anthony N. Bishop, *The Unenforceable Rights To Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, 25 HOUS. J. INT'L L. 1, 6 (2002).

70. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, Inter-Am. Ct. H.R., (ser. A) No. 16 (Oct. 1, 1999).

71. *See Breard*, 1998 I.C.J. at 258 (para. 41).

ures at its disposal to ensure that Angel Francisco Breard [would] not [be] executed pending the final decision" of the Court.[72] While this Order addressed the U.S. without any further specification, in a separate opinion, the Court's President recognized "the serious difficulties which [the order imposed] on the authorities of the [U.S.] and Virginia."[73] As in all prior cases similar to *Breard*, the U.S. insisted that an apology to the country of nationality was an appropriate and sufficient remedy for its violation of the Vienna Convention. As a result, Virginia carried out the execution as planned on April 14, 1998. In the process leading up to the execution, various U.S. organs explicitly recognized the ICJ's Order, but justified their decision not to adhere to it by referring to its alleged lack of binding power, either for the U.S. generally or for them specifically.[74] Paraguay initially indicated that it would pursue its case against the U.S. before the ICJ after the execution, but later revoked its application.

Less than a year after Breard's execution and just weeks after Karl LaGrand's execution, the ICJ issued provisional measures at the request of Germany to stop the execution of Walter LaGrand.[75] The U.S. position in *Breard* obviously influenced the ICJ's handling of the *LaGrand* case, as is reflected in the Court's issuance of provisional measures. In fact, Germany had asked the Court for no more than an Order that was identical to the Court's Order in *Breard*, requiring the U.S. to take all

72. *Id*.

73. *Id*. at 259 (separate declaration of President Schwebel).

74. *See* Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 561–65 (1999); Jonathan I. Charney & William Michael Reisman, *Agora: Breard. The Facts*, 92 AM. J. INT'L L. 666, 672–73 (1998). The Justice and State Departments interpreted *Breard* as follows:

> [E]ven if parties to a case before the ICJ are required to heed an order of that court indicating provisional measures, the ICJ's order in this case does not require *this Court* to stop Breard's execution. That order states that the United States "should" take all measures "at its disposal" to ensure that Breard is not executed….[T]he "measures at [the Government's] disposal" are a matter of domestic United States law.

Id. (citing to an amicus brief by those departments to the Supreme Court).

75. LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9, 10 (March 1999) (Request for the Indication of Provisional Measures).

measures at its disposal to prevent the upcoming execution.[76] The Court, however, went further and issued an Order with the following provisional measures:

> (a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this order;
>
> (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.[77]

Section (a) of the Order follows the same pattern as the Court's Order in *Breard*, as Germany had requested. The specific order in section (b), however, added *sua sponte*, reflects the ICJ's lack of success in the *Breard* case. The meaning of the operative paragraph is somewhat facially ambiguous. It is not immediately clear whether the Court intends to directly obligate the Governor of Arizona, or if it wishes to only oblige the U.S. government to inform the Governor of the Order without attaching a corresponding obligation. Yet, the former interpretation seems the only plausible one when read in conjunction with the Order's preceding comments in paragraph 28, where the Court spells out the Governor's obligation:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; *whereas the Governor of Arizona is under*

76. Judge Buergenthal considered Germany's request for an Order identical to *Breard* to be a breach of Germany's obligation of elementary fairness toward the U.S. because Germany had acted with the knowledge that the U.S. interpreted *Breard* as non-binding. *See LaGrand*, 2001 I.C.J. 104 (dissenting opinion Judge Buergenthal).

77. *LaGrand*, 1999 I.C.J. at 10.

> *the obligation to act in conformity with the international undertakings of the United States*....[78]

As it is highly unlikely that the Court would pronounce on the Governor of Arizona's obligations under the U.S. laws, especially without further elaboration, it seems the Governor's obligation to act in conformity with the U.S.' international undertakings must be one under international law. That the Court addressed the U.S. government and not the Governor directly can be explained as a procedural matter, stemming from the federal government's position as the legal representative of the State and its organs.[79]

Nevertheless, as in *Breard*, U.S. officials disregarded the Court's provisional measures. Arizona carried out the second execution as planned on March 3, 1999, the same day the ICJ issued its Order. Germany pursued the case, and on June 27, 2001, the ICJ delivered its final judgment.[80] Although again in ambiguous language, the Court's ruling seems to support the view that the Governor was bound by the U.S.' obligation to "take all measures at its disposal."[81] After the Court determined, for the first time, that provisional measures indeed do create legal obligations,[82] the Court reviewed whether the U.S. had complied with its obligations under the March 3, 1999 Order. No dispute arose over the second provisional measure, as the U.S. government had transmitted the Order to Arizona's Governor.[83] Instead, the question was whether the U.S. had taken "all measures at its disposal" to prevent the execution, as the first provisional measure required.

The U.S. argued that it had done all it could by transmitting the Order to Arizona's Governor and informing the ICJ of this action. Due to the extraordinary short time between the Court's Order and the execution, as well as the U.S.' legal character as a "federal republic of divided powers," the U.S. alleged

78. *Id*. at 16 (para. 28) (emphasis added).

79. *Cf.* I.C.J. STAT. art. 44(1) ("For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.").

80. *See LaGrand*, 2001 I.C.J. 104, at paras. 109–10.

81. *Id*. at para. 32.

82. *Id*. at paras. 109–10.

83. *Id*. at para. 111.

that no other steps were possible.[84] The U.S. took the classic black-box position, interpreting the Court's order as binding on the State entity, the federal government, but not on the various U.S. organs involved in the case. Because of complex separation of powers issues and a lack of time, the State was unable to "translate" its obligation to the relevant State organs in this case.

The Court had a different perspective. It specifically described the steps that various U.S. organs took in the case. The Court explicitly noted that both the Governor of Arizona and the U.S. Supreme Court had declined to use their authority to grant a stay of execution,[85] and then concluded:

> The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order. The Order did not require the United States to exercise powers it did not have; but it did impose the obligation to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings…." The Court finds that the United States did not discharge this obligation.[86]

Thus, it seems that the Court considered both the Governor and the U.S. Supreme Court to be bound by the U.S. international obligations in this case.[87] Otherwise, the Court would not have analyzed their conduct regarding U.S. compliance with its obligation to "take all measures at its disposal."[88] Instead, the

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84. *Id*. at para. 95.

85. *Id*. at paras. 113–14.

86. *Id*. at para. 115.

87. *Compare* Higgins, *The Concept, supra* note 9, at 555 (commenting on the identical order in *Breard*: "The relevant powers were dispersed both within the federal structures and between federal institutions and the State of Virginia. Hence it was for 'the United States' to take 'all measures at its disposal.'") *with* Jochen A. Frowein, *Provisional Measures by the International Court of Justice — The LaGrand Case*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VÖLKERRECHT [JOURNAL OF FOREIGN PUBLIC AND INTERNATIONAL LAW] 55, 59 (2002) ("This part of the judgment is difficult to read without implying that the United States is limited to the Federal Government, and the Federal Government has limited powers.").

88. *LaGrand*, 2001 I.C.J. 104, at para. 32.

Court would have focused entirely on the question of whether time had prevented the U.S. government from taking additional measures.

2. *Cumaraswamy*

Less than two months after ordering provisional measures in *LaGrand*, on April 29, 1999, the ICJ issued an Advisory Opinion in a dispute between the United Nations ("UN") and Malaysia regarding the immunity of the UN's Special Rapporteur on the Independence of Judges and Lawyers in the Malaysian Courts' civil proceedings.[89] Several Malaysian companies had sued the Rapporteur, Mr. Cumaraswamy, due to certain allegedly defamatory comments that he had made in a magazine interview.[90] Despite multiple interventions by the UN Secretary-General, the Malaysian courts had refused in several instances to grant Mr. Cumaraswamy immunity from legal process pursuant to Article VI section 22(b) of the Convention on the Privileges and Immunities of the UN.[91] The UN Economic and Social Council then requested an Advisory Opinion from the Court pursuant to Article 30 of the Convention, in accordance with Article 96 of the UN Charter and Article 65 of the ICJ Statute. The Council asked the Court to determine, in short: (1) whether Mr. Cumaraswamy enjoyed immunity under the circumstances described; and (2) Malaysia's legal obligations in this case.[92]

In its opinion, the ICJ let no doubt exist about its position regarding State organs. It found *inter alia*:

> (1)(a)….That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that Dato' Param Cumaraswamy was entitled to immunity from legal process;…

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89. *See Cumaraswamy*, 1999 I.C.J. 62, at para. 43 (April 29). *See also* Hazel Fox, *The Advisory Opinion on the Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission of Human Rights: Who Has the Last Word on Judicial Independence?*, 12 LEIDEN J. OF INT'L L. 889, 911 (1999).

90. *See* Dato' Para Cumaraswamy v. MBF Capital BHD & Anor (Court of Appeal, Kuala Lumpur 1997) 3 MLJ 824.

91. *See id*. at 837.

92. *Cumaraswamy*, 1999 I.C.J. at 78, 81 (paras. 31, 36–37).

> ....
>
> (2)(a)....That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*;...
>
> ....
>
> (4) That the Government of Malaysia had the obligation to communicate this advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected....[93]

Thus, the Court unambiguously held that the obligations under the Convention were not only those of the State of Malaysia, but also of the State organs involved, namely the Malaysian Courts.

The only Judge to vote against these three paragraphs was Judge Koroma.[94] He did not categorically rule out State organs' international obligations, but he also could not derive such an obligation from the particular facts of the case.[95] Judge Oda joined Judge Koroma in his dissent on the Malaysian government's obligations. Judge Oda wholeheartedly embraced the finding of an obligation of the Malaysian courts,[96] but deemed the findings on the government's obligations unwarranted.[97]

The Malaysian High Court subsequently decided that the ICJ's Advisory Opinion had to be respected in this case, treating Malaysia's international obligations as decisive for the outcome.[98] The High Court emphasized that international obligations voluntarily undertaken cannot easily be ignored.[99] It con-

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93. *Id*. at 89 (para. 67).

94. *Id*. at 111 (para. 1 of Judge Koroma's separate opinion).

95. *See id*. at 121 (para. 28).

96. *Id*. at 106 (para. 20) (separate opinion of Judge Oda).

97. *Id*. at 107 (paras. 23–26).

98. Insas Bhd and Another v. Dato' Param Cumaraswamy, 7 July 2000, *reprinted in* 121 I.L.R. 464–471 (2002). *See* Sujantani Poosparajah, *Param is Immune, Rules High Court*, NEW STRAITS TIMES, July 8, 2000, at 2, *available at* 2000 WL 22839864.

99. *Cumaraswamy*, 121 I.L.R. at 468, 470. The Court explained:

> Whilst the Malaysian courts including the Appellate Court had decided that the issue of immunity as claimed by the defendant was a matter to be decided by this court during the course of the trial, the Government of Malaysia and the United Nations by consent agreed to

sidered itself bound by the ICJ's interpretation in this case, emphasizing that the judiciary is "one of the three organs that ensures good governance."[100] The decision's language clearly displays the idea that State organs have the duty to respect the international obligations of their State, regardless of the "translation" of those obligations into national law.

Overall, the ICJ clearly embraced the concept of State organ obligation in this case, in more explicit terms than in *LaGrand*. Both cases, however, squarely contradict the black-box theory.

3. Analysis: New Substance or New Formulation?

At this point, an important question arises — how do we read these recent ICJ cases? Does the Court's discussion of State organs constitute a radical break in its jurisprudence, abandoning the black-box theory for a model of State penetration? Are these cases truly exceptions that are simply not representative

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> refer this question of Param's immunity for an advisory opinion to the [ICJ]….
>
> ….
>
> Whilst the Malaysian courts had made a decision (in the Appeal Court) binding on its citizens, the Malaysian Government had voluntarily acceded to be bound by the advisory opinion of the ICJ….
>
> ….
>
> It is also a fact that both the United Nations and Malaysia had agreed to accept the opinion given by the ICJ "as decisive by the parties." This is a serious consequence which parties had willingly entered into and it is therefore a matter of grave concern for this court to be called upon to rule otherwise.

Id.

100. *Id*. at 471. The Court also noted:

> It is clear therefore that whilst the judiciary being one of the three organs that ensures good governance, had agreed to stay execution on its own order by awaiting the advisory opinion, it must have been moved to do so because of the voluntariness of the executive in agreeing to abide by the decision of the ICJ in respect of the defendant's immunity….
>
> ….
>
> [The Court is] bound to give binding effect to the advisory opinion in this case.

Id.

of the Court's case law? Or is there nothing substantially new in these cases? Does the Court only explicitly express in these cases what its earlier judgments silently assumed all along: that obligations of the State are obligations of its organs?

Judging by the text of these decisions, one could think that the last view proves more plausible. In the numerous separate and dissenting opinions of both *LaGrand* and *Cumaraswamy*, many of the Judges explicitly discuss and endorse State organ obligations without feeling the need for elaborate justifications. None of the Judges take issue with the concept of State organ obligation, not even the dissenters. More importantly, none of the Judges treat the discussion of State organs as a novelty.

That the ICJ detailed the obligations of State organs in *LaGrand* and *Cumaraswamy*, whereas it normally goes to lengths to refrain from any interference with the internal organization of the States involved, could be explained by the particular circumstances of these cases. In both instances, there were clear indications that the States involved (and their organs) would use any room left by the Court's judgment to avoid giving effect to the Court's ruling. In *LaGrand*, the Court remembered the recent unwillingness of the different U.S. actors in *Breard* to give effect to its Order. Moreover, the U.S. was a repeat offender where it concerned consular aid to foreign prisoners. In *Cumaraswamy*, the different Malaysian courts' decisions showed a decided lack of interest for the UN Secretary-General's opinion, creating the very dispute in question.[101] It was not immediately clear that the national courts would treat the ICJ's judgment as more authoritative or as just another international communication that did not need to be obeyed.

Thus, in both cases, the Court might have felt compelled to spell out what it otherwise would have left implicit, for fear of a lack of good faith interpretation of the judgment by the parties involved.[102] This interpretation finds some support in a com-

101. *See Cumaraswamy*, 1999 I.C.J. 62.

102. *Cf.* Higgins, *The Concept*, *supra* note 9, at 556. Higgins elaborates:

> Nor had the Court been unaware of the events within the United States that had followed its provisional measures in the *Breard* case. Accordingly, it decided to use some new language, in the attempt to speak across the miles directly to more of those relevant elements comprising "the state" which was the ratifying party under the Vienna Convention, and over which the Court *thus* had jurisdiction.

parison with the ICJ's later case law. In the Case Concerning the Arrest Warrant of April 11, 2000, *Democratic Republic of the Congo v. Belgium*,[103] the Court again gave judgment in more familiar terms. It found that the arrest warrant's issue and circulation against the Congolese Minister of Foreign Affairs "constituted violations of a legal obligation of the Kingdom of Belgium," and "that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of [April 11, 2000] and so inform the authorities to whom that warrant was circulated."[104]

Like *Cumaraswamy*, this case involved the violation of immunity under international law by national courts.[105] A Belgian magistrate issued the disputed arrest warrant.[106] Similar to the Court's treatment of the issues in *Cumaraswamy*, the ICJ could have addressed the obligations of Belgian judicial organs directly, as it had already identified the relevant actors. One cannot explain the difference in the Court's approach in the two cases by comparing the complaining parties' litigation strategies, because both the United Nations Economic and Social Council ("ECOSOC") (in *Cumaraswamy*) and Congo only addressed the obligations of the State and not specific State organs.[107] The fact that the Court on its own initiative discussed State organs in *LaGrand* and *Cumaraswamy* while it addressed the similar case of *Congo v. Belgium* only in very general terms, might have been prompted by the fact that unlike the U.S. and Malaysia in the first two cases, Belgium had displayed no tendency whatsoever to disregard international law. Accordingly, these three cases could be seen as consistent rather than incompatible, differing primarily in their degree of explicitness.

A more realistic view, on the other hand, may be that the ICJ has taken two particularly amenable cases to introduce the un-

Id. (emphasis added).

103. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 121, at paras. 18, 43, 59 (Feb. 14), *reprinted in* 41 I.L.M 536, available *at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudg ment /icobe_ijudgment_20020214.PDF (last visited Sept. 9, 2003).

104. *Id.* at paras. 75–78.

105. *Id.* at para. 1.

106. *Id.* at para. 13.

107. *Id.* at paras. 11, 13.

precedented concept of State organ obligation in the Court's case law, and thereby took a conscious new step to strengthen international law. Both cases involved fields of law where the black-box theory is historically least accepted — consular law and immunity from legal process. Both cases also involved human rights concerns, the field of law where there is the strongest challenge to black-box theory.[108] Moreover, in both cases, the violating State enjoyed little to no sympathy from the international community, and there was considerable support for a strong affirmation of the obligations involved.[109] These factors minimized the risk of broad opposition to the Court's judgments and made *LaGrand* and *Cumaraswamy* suitable testing-grounds for a shift in the ICJ's case law and a more forceful reading of international obligations.

Finally, a traditional view would be that the circumstances described here led the Court to overstep its authority and that these cases are mere exceptions that do not represent the Court's jurisprudence. However, the ICJ's reasoning in *LaGrand* and *Cumaraswamy* is rather determined and too explicit to be merely incidental. Moreover, the Court's rulings in these cases are in line with similar developments in other courts, which this Article will further elaborate. But before doing so, the next section turns to a pending case before the ICJ that may very well prove to be the next step in "piercing the State veil."

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108. *See* JO PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 327 (2003) [hereinafter PASQUALUCCI]; NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 96–97 (2002). Jayawickrama asserts that:

> The international law of human rights is substantially different from traditional international law.…The fact that it is the executive branch of government that represents the state in accepting obligations under the [human rights] treaty, does not exempt the legislative and judicial branches from performing those obligations. It can hardly be argued that the legislature and the judiciary of a state party to a human rights treaty are free to ignore or decide not to give effect to, its provisions. The commitment is made by 'the state,' which, in this context, must mean all three branches of government.

Id.

109. *See* Cassel, *Judicial Remedies*, *supra* note 10, at 853, 862–63, 874–75.

4. *Avena and Other Mexican Nationals*: The Next Step?

The Vienna Convention on Consular Relations did not stay off the ICJ docket for long. While the U.S. federal government had started an extensive program to improve compliance with the Convention prior to *LaGrand*, many contest the effects of that program. Moreover, the review of Convention violations has generally been limited to consideration in the clemency process both in existing and new cases. U.S. courts have continued to deny remedies for these violations.[110] Criticism of the U.S.' limited response to *LaGrand* has been broad and sharp.[111]

On January 9, 2003, Mexico was, after Paraguay and Germany, the third country in five years to institute proceedings against the U.S. before the ICJ for alleged violations of the Vienna Convention on Consular Relations.[112] Mexico's submission concerns the cases of Carlos Avena and fifty-three other Mexican nationals on death-row in the U.S.[113] Drawing heavily on *Breard* and *LaGrand* and raising similar questions, the *Avena* case will likely bring the question of State organ obligation back to the ICJ. Mexico asked the Court to declare, *inter alia*:

> That the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character....[114]

Mexico also requested the Court to indicate provisional measures to prevent all executions while the case was pending. Referring to the U.S. record on this subject, Mexico asked for a

110. *See* Douglas Cassel, *International Remedies in National Criminal Cases: ICJ Judgment in Germany v. United States*, 15 LEIDEN J. OF INT'L L. 69, 79 (2002).

111. *See, e.g.*, Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT'L L. 427 (2002).

112. *Avena*, 2003 I.C.J. 128.

113. *Id.* at para. 1.

114. *Id.* at para. 281.

swift and forceful order.[115] The application requested the Court to indicate *inter alia* that the U.S. government "take all measures necessary to ensure that no Mexican national be executed" pending final judgment.[116]

The requested phrase "all measures necessary" would be a significant departure from the Orders in *Breard* and *LaGrand*, both of which required the U.S. to take "all measures at its disposal."[117] Moreover, the Court had itself formulated the less demanding language in the *Beard* case,[118] while Paraguay had made an identical request for an indication of "all measures necessary."[119] Opposing the requested departure from the Court's earlier, more lenient orders, the U.S. vigorously contested Mexico's application. The U.S. noted that: "the relationship between the [U.S.] federal government and its states is one of great sensitivity, marked by the deference to the states in certain areas, including the administration of criminal law."[120] In addition, the U.S. stated that Mexico's request entailed an obligation directly implicating the federal relationship, which deviated from the Court's holdings in *Breard* and *LaGrand*, as Mexico's request tested the "limit of federal authority."[121] Thus, the U.S. implied that U.S. federal authorities could not execute Mexico's provisional measures, while the constituent states that could execute them were not concerned by the proceedings before the ICJ.[122]

The Court was not convinced by these objections. On February 5, 2003, the ICJ indicated provisional measures against the U.S. even broader than those Mexico had requested. While its

115. *See* Avena and other Mexican Nationals (Mexico v. U.S.), 2003 I.C.J. Order No. 128, para. 14 (Feb. 5) [hereinafter *Avena*, Order]; Avena and other Mexican Nationals (Mexico v. U.S.), 2003 I.C.J. Verbatim Record 2003/1 No. 128, para. 141 (Jan. 21) [hereinafter *Avena*, Verbatim].

116. *Avena*, Order, *supra* note 115, at para. 18(a).

117. *Cf. Note: Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond The Reach of The Law of Nations?*, 116 HARV. L. REV. 2654, 2671 (2003) (arguing that the difference in language "bespeaks a court emboldened by its own prior holding that its provisional measures are binding.").

118. *Breard*, 1998 I.C.J. at 258 (para. 41).

119. *Id.* at 251–52 (para. 9).

120. *Avena*, Verbatim, *supra* note 115, at para. 3.43.

121. *Id*. at para. 3.44.

122. *See* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 432 (2003). *Cf.* Bradley, *supra* note 74, at 562.

applicability is limited to only three of the more than fifty cases, the Order puts stringent demands on U.S. authorities. The Court unanimously[123] indicated that:

> a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;
>
> b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.[124]

The Court not only adopted Mexico's formulation of "all means necessary,"[125] but also addressed the obligation to take those measures not just to the U.S. government, as Mexico had requested, but to the U.S. as a whole.[126] At first glance, it seems a classic black-box formulation to address the State rather than the government. However, it could well prove to be more intrusive if this formulation is interpreted to address not only federal, but also state authorities. The Court's choice of wording leaves open the possibility that all U.S. organs involved in these types of cases, including governors and courts, are under the obligation to prevent the executions. This conclusion forms the logical consequence of applying the Court's reasoning in *LaGrand* to this Order (i.e., that U.S. authorities such as governors are "under the obligation to act in conformity with the international undertakings" of the U.S.).[127] The Court also mentioned Mexico's submission that "[a]s a matter of international

123. Judge Oda, however, appended a declaration, which is in effect a dissenting opinion. The consular relations cases apparently brought out an irresistible urge in Judge Oda to vote out of humanitarian concerns in favour of Orders which he found legally unsound, while simultaneously pointing out the perceived errors in those Orders in dissenting opinions disguised as declarations. *See Avena*, 2003 I.C.J. 128, Declaration of Judge Oda, (Feb. 5) (stating that there is no dispute to be adjudicated); *LaGrand*, 1999 I.C.J. at 18 (Judge Oda explained: "I voted in favour of the Court's Order with great hesitation as I considered that the request for indication of provision measures of protection submitted by Germany to the Court should have been dismissed."); *Breard*, 1998 I.C.J. at 260 (Judge Oda's statement was almost identical to his statement in *LaGrand*).

124. *Avena*, Order, *supra* note 115, at paras. 59(I)(a–b).

125. *Avena*, Verbatim, *supra* note 115, at para. 3.44.

126. *Avena*, Order, *supra* note 115, at para. 59(I)(a).

127. *LaGrand*, 1999 I.C.J. at 16 (para. 28).

law, both the [U.S.] and its constituent political subdivisions have an obligation to abide by the international legal obligations of the [U.S.]," but did not comment on it.[128]

As it seems unlikely that the U.S. will radically change its course in this matter, considerable chances exist that the final judgment in *Avena* will bring more clarity to the exact scope of the ICJ's Order.[129] In an initial reaction, the Governor of Texas already indicated that orders from American courts are the only ones Texas will follow, as "according to [his] reading of the law and the treaty,…no authority [exists] for the [U.S.] federal government or th[e] World Court to prohibit Texas from exercising the laws passed by [its] legislature."[130]

B. Other International Courts

The ICJ is not alone in its efforts to speak directly to relevant actors within the State. In fact, it is only taking the first cautious steps on a path where other international courts have made considerable progress. The most prominent example is the law of the European Community. Even if the different embeddings and political realities of the various international courts do not allow for easy predictions by comparison, it is certainly illuminating to see how other international courts have pierced the State veil to reach the State organs behind it.

It should be kept in mind that the constituting treaties of most international courts consider States in similar terms as the ICJ. In terms of input, the direct participation of individuals and the referral procedure for national courts constitute important differences between some of the other international courts discussed here and in the ICJ. Nonetheless, the underlying treaties envisage a relationship between these courts and their State parties as unitary actors.[131] Thus, in terms of output, other international courts deal with State organs in a legal framework that is largely comparable to that of the ICJ.

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128. *Avena*, Order, *supra* note 115, at para. 16.

129. Public hearings in the case have been scheduled for December 15–19, 2003. *See* http://www.icj-cij.org/icjwww/idocket/imus/imus/imuscontent.htm.

130. *Texas to Ignore Court Order to Stay Executions*, L.A. TIMES, Feb 7, 2003 at A33, *available at* 2003 WL 2383552 (last visited Aug. 22, 2003).

131. *See* Helfer & Slaughter, *supra* note 9, at 299–93.

This Section will now, in a necessarily anecdotal manner, discuss how the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia and the World Trade Organization ("WTO") have dealt with the international obligations of State organs.

1. The European Court of Justice

The case law of the European Court of Justice ("ECJ") is undoubtedly the most far-reaching and inspiring in its treatment of State organs. This Article will only offer some cursory comments on its relevance since the ECJ's piercing of the State veil is so well known.[132]

First, the ECJ played a pivotal role in transforming the European legal order from a traditional international law model to a model of direct obligation of State organs.[133] While today European law undoubtedly forms a distinct legal order,[134] at its conception this order had more similarities than differences with international law.[135]

Second, the ECJ applies and interprets both European and international law as directly affecting State organs. Under certain circumstances, the ECJ applies treaties between the Euro-

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132. *See* KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (Oxford University Press 2001) [hereinafter ALTER]. *See also* DIRECT EFFECT: RETHINKING A CLASSIC OF EC LEGAL DOCTRINE (Jolande M. Prinssen & Annette Schrauwen eds., 2002). For a concise description of the European Court of Justice, see JEAN ALLAIN, A CENTURY OF INTERNATIONAL ADJUDICATION: THE RULE OF LAW AND ITS LIMITS 157–79 (T.M.C. Asser Press 2000); *see also* Helfer & Slaughter, *supra* note 9, at 290–93.

133. *See* Wasilkowski, *supra* note 19, at 333–36.

134. *Cf.* Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351, 356–357 (1999) (describing the specific characteristics of the "emancipated" European legal order).

135. As Karen Alter explains:

> The EU's legal system may today be more "supranational" than "international." But this was not always so. To forget the European Community's origin as an international legal system would miss an important opportunity to learn lessons from the European experience that are potentially valuable for other international legal systems.

ALTER, *supra* note 132, at xii.

pean Community and third parties,[136] the European Convention of Human Rights,[137] and other sources of international law.[138] Both its historical development and concurrent application of European and international law make the ECJ's case law relevant when assessing the black-box theory.

Third, the direct obligation of national courts has not only stimulated compliance with ECJ rulings, it has also brought about innovations in European law. The refusal of certain national courts, in particular the German Constitutional Court, in the *Solange* cases,[139] to recognize the supremacy of European Union law in the absence of human rights guarantees, prompted the development of human rights in European law.[140] State organ obligation in international law may likewise stimulate the dialogue between national and international actors, and, if only through exceptional cases of disobedience, enhance the quality of international law.

2. The European Court of Human Rights

The binding force of the judgments of the European Court of Human Rights ("ECHR") is established in Article 46 (formerly

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136. *See* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 179–85 (2nd ed. 1998) (explaining the ECJ's "direct effect" policy in applying international agreements).

137. *See, e.g.*, Xavier Groussot, *UK Immigration Law under Attack and the Direct Application of Article 8 ECHR by the ECJ*, 3 NON-STATE ACTORS AND INTERNATIONAL LAW (forthcoming 2003) (on file with author).

138. *See generally* Trevor C. Hartley, *International Law and the Law of the European Union — A Reassessment*, 72 Y.B. OF INT'L L. 1 (2002); Jan Klabbers, *International Law in Community Law: The Law and Politics of Direct Effect*, 21 Y.B. OF EURO. L. 263 (2002); Anne Peters, *The Position of International Law Within The European Community Legal Order*, 40 GERMAN Y.B. OF INT'L L. 9 (1997).

139. *See Solange I*: BVerfGE 74, 358, 26.3.1987, *available at* http://www.oefre.unibe.ch/law/dfr/bv037271.html; *Solange II*: BVerfGE 89, 155, 12.10.1993 *available at* http://www.oefre.unibe.ch/law/dfr/bv073339.html#Opinion. *See* ALTER, *supra* note 132, at 90–94.

140. *See also Solange III*: BVerfGE 102, 147, 7.6.2000, *available at* http://www.oefre.unibe.ch/law/dfr/bv102147.html. For an analysis of the relationship between national courts and the ECJ, see NIKOS LAVRANOS, INTERACTIONS BETWEEN LEGAL ORDERS: A STUDY ON THE INTERACTIONS BETWEEN DECISIONS OF INTERNATIONAL ORGANIZATIONS, THE EUROPEAN AND DOMESTIC LEGAL ORDERS OF SELECTED EU MEMBER STATES, ch. 4 (Europa Law Publishing, Groningen) (forthcoming March 2004) (on file with author).

Article 53) of the European Convention of Human Rights, which declares, "the High Contracting Parties undertake to abide by the final judgment of the ECHR in any case to which they are parties."[141] Many commentators now interpret decisions of the ECHR as bearing directly on State organs.[142] Judge Martens characterized those obligated by his decisions as "all institutions of the respondent State: the legislature, the executive and the judiciary," and he particularly stressed that then Article 53 could "imply an obligation on the judiciary" as well.[143] Others have noted more cautiously that the Court is in the process of abandoning a policy of "institution neutrality,"[144] and is increasingly focusing on the compliance of State parties' courts with the European Convention, rather than on compliance by States as entities.[145]

A pivotal case in this development is that of *Vermeire v. Belgium* from 1991.[146] It revisited the different inheritance rights of legitimate and illegitimate children in Belgium, which the Court, in a 1979 case, had declared discriminatory and in violation of the Convention.[147] While the Belgian legislature had acknowledged the problem and started revising the relevant law even prior to the 1979 judgment, that process was still underway when the case of Mrs. Vermeire came up years later.[148]

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141. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, art. 46, 1950, ETS No. 5, 213 U.N.T.S. 221.

142. *See infra* notes 162–64.

143. S.K. Martens, *Commentary*, *in* COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 71, 71–72 (M.K. Bulterman & M. Kujier eds., 1996).

144. *See* Danny Nicol, *Lessons from Luxembourg: Federalisation and the Court of Human Rights*, 26 EUR. L. REV. HUM. RTS. SURV. 3, 13, 18 (2001).

145. *Id.*

146. *See* Vermeire v. Belgium, 214–C Eur. Ct. H.R. (ser. A) (1991). *See* Jörg Polakiewicz, *Die Innerstaatliche Durchsetzung der Urteile des Europäischen Gerichtshof für Menschenrechte: Gleichzeitig eine Anmerkung zum Vermeire-Urteil des Europäischen Gerichtshofs für Menschenrechte vom 29. November 1991* [Domestic Enforcement of Judgments of the European Court of Human Rights: The Judgment of the European Court of Human Rights of 29 November 1991 in the case of *Vermeire v. Belgium*, with summary in English], 52 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [JOURNAL OF FOREIGN PUBLIC AND INTERNATIONAL LAW] 149–90.

147. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) (1979), 2 Eur. H.R. Rep. 330.

148. *Vermeire*, 214–C Eur. Ct. H.R. at para. 24.

Faced with the discriminatory law on the one hand and the European Court's condemnation of that law on the other, the Brussels Court of First Instance decided to grant Mrs. Vermeire, an illegitimate child, the same inheritance rights as legitimate children in contravention of the law.[149] The Brussels court reached this result by finding that:

> [T]he prohibition on discrimination between legitimate and illegitimate children as regards inheritance rights [was] formulated in the [1979 ECHR] judgment sufficiently clearly and precisely to allow a domestic court to apply it directly in the cases brought before it.[150]

Thus, the Brussels court refused to wait for the "translation" of the ECHR judgment into national legislation, and simply complied with Belgium's international obligation.

However, this reasoning was quashed on appeal and cassation, and Mrs. Vermeire was denied a right of inheritance.[151] The Brussels Court of Appeal addressed the effects of the European Convention and commented that:

> [I]n so far as Article 8 [ECHR] entails negative obligations prohibiting arbitrary interference by the State in the private or family life of persons residing within its territory, it lays down a rule which is sufficiently precise and comprehensive and is directly applicable, but this is not the case in so far as Article 8 [ECHR] imposes a positive obligation on the Belgian State to create a legal status in conformity with the principles stated in the said provision of the Convention;...given that on this point the Belgian State has various means to choose from for fulfilling this obligation, the provision is no longer sufficiently precise and comprehensive and must be interpreted as an obligation to act, responsibility for which is on the legislature, not the judiciary.[152]

Contrary to the court of first instance, the Brussels Court of Appeal felt it could not live up to the international obligation in question, because the legislature had not yet "translated" the international norm into national law. However, the argument that the provision was not sufficiently precise is a curious one.

149. *Id*. at para. 10.
150. *Id*.
151. *Id*. at para. 11.
152. *Id*. at para. 11.

While there may have been different ways to achieve the ECHR provision's desired result, the ultimate goal was clear and could have been reached by the Court of Appeals, just as the Brussels Court of First Instance had initially ruled.

The European Court did not agree with the Court of Appeal's reasoning.[153] It dismissed the Belgian government's argument that the 1979 judgment obliged the Belgian State, but not the Belgian courts.[154] The Court held in particular that:

> It cannot be seen what could have prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the Marckx judgment, as the Court of First Instance had done. There was nothing imprecise or incomplete about the rule which prohibited discrimination against Astrid Vermeire compared with her cousins Francine and Michel, on the grounds of the "illegitimate" nature of the kinship between her and the deceased.…The freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 [(now Article 46 ECHR)] cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed….[155]

Thus, the Court required national courts to enforce their State's obligations under the European Convention, *regardless* of their reception in national law.[156] This demand on national courts was implicitly affirmed in a subsequent case where the ECHR characterized the Andorran Tribunal de Corts as "a court not bound by the Convention," because it is neither French nor Spanish, thereby implying that the courts of contracting parties are bound.[157] The ECHR effectively established an "autonomous direct effect" of the European Convention, which to this day requires national courts to act not only as

153. *Id*. at para. 24.
154. *Id*. at para. 25.
155. *Id*. at paras. 25–26.
156. *See* Polakiewicz, *supra* note 146, at 189.
157. Drozd and Janousek v. France and Spain, 240 Eur. Ct. H.R. (ser. A) paras. 96, 110 (1992). *See also* Joint Dissenting Opinion of Judges MacDonald, Bernhardt, Pekkanen and Wildhaber ("It is to be regretted that the Convention is not applicable in the territory of Andorra, and that the organs of that entity are not bound by it"); Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha, Approved by Judges Walsh and Spielmann (rhetorically addressing the obligations of French officials).

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State organs, but also as organs of the Convention.[158] This type of judicial action has led several commentators to liken the piercing of the State veil by the ECHR to the practice of the ECJ.[159] The case law of the ECHR thus represents a particular example of the "breaking of the black-box."[160]

3. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights ("IACHR") oversees compliance with the American Convention of Human Rights[161] by those States that have accepted its jurisdiction. The Inter-American system is, like its counterparts on other continents, designed to deal with States as relevant units.[162] Compliance with the IACHR's judgments is an obligation of the

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158. F.M.C. VLEMMINX, DE AUTONOME RECHTSTREEKSE WERKING VAN HET EVRM [THE AUTONOMOUS DIRECT EFFECT OF THE ECHR] 112 (2002).

159. *Id*. at 103; *see also* Helfer & Slaughter, *supra* note 9, at 297–98.

160. *See* Polakiewicz, *supra* note 146, at 189.

161. American Convention on Human Rights, Nov. 22 1969, 1144 U.N.T.S. 143, 145 (entered into force July 18, 1978).

162. *See id*. art. 2. Article 2 on domestic legal effects states:

> Where the exercise of any of the rights or freedoms referred to in Article I is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Id. See also id. art. 28. Article 28 states:

> 1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
>
> 2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfilment of this Convention.
>
> 3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

Id.

State as an entity, with the notable exception of the stipulation of compensatory damages, for which a form of direct effect is established.[163] While Article 63(1) of the Convention allows the IACHR to determine what specific steps are necessary to remedy a violation, such a determination is to be addressed to and implemented by the State.[164]

This State-centric approach is reflected in a 1994 Advisory Opinion prompted by an initiative of the Peruvian legislature to broaden the application of the death penalty in contravention of the Convention.[165] The two-pronged question posed to the IACHR by the Inter-American Commission inquired into the legal effects of a law that manifestly violates the Convention, insofar as the international obligations of the State are concerned, and "the duties and responsibilities of the agents or officials" of the State when the enforcement of such a law would manifestly violate the Convention.[166] Thus, faced with an unorthodox invitation to go beyond black-box theory, the IACHR declined and gave little more than a formulation of truisms. The IACHR unanimously found:

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163. *See id.* art. 68 at 160. Article 68 of the Convention states:

> 1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
>
> 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

Id. *See also* Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 240 (1982).

164. *See* American Convention on Human Rights, 1144 U.N.T.S. 143, at art. 63(1). Article 63(1) reads:

> If the Court finds that there has been a violation of a right of freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Id.

165. *See* International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (art. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC–14/94 of Dec. 9, 1994, Inter-Am. Ct. H.R. (Ser. A) No. 14.

166. *Id*. at para. 1.

> (1) That the promulgation of a law in manifest conflict with the obligations assumed by a State upon ratifying or acceding to the Convention is a violation of that treaty. Furthermore, if such violation affects the protected rights and freedoms of specific individuals, it gives rise to international responsibility for the State in question.
>
> (2) That the enforcement by agents or officials of a State of a law that manifestly violates the Convention gives rise to international responsibility for the State in question. If the enforcement of the law as such constitutes an international crime, it will also subject the agents or officials who execute that law to international responsibility.[167]

In reaching its conclusion, the IACHR indicated that it considered itself subject to strict limits on the interference with the domestic legal orders of the State parties to the Convention:

> In exercising its advisory jurisdiction, the Court is not empowered to interpret or define the scope of the validity of the domestic laws of the States parties, but only to address their compatibility with the Convention or other treaties concerning the protection of human rights in the American States.…In the event of a supposed violation of the international obligations assumed by the State parties resulting from a possible conflict between the provisions of their domestic law and those contained in the Convention, the former will be evaluated by the Court in contentious cases as simple facts or expressions of intent which can only be addressed as they relate to the conventions or treaties concerned.…The [first] question refers only to the legal effects of the law under international law. It is not appropriate for the Court to rule on its domestic legal effect within the state concerned. That determination is within the exclusive jurisdiction of the national courts and should be decided in accordance with their laws.[168]

Thus, the Court stuck to a classic black-box position. It spoke of the State's international obligations as an entity, but found that domestic consequences of any violations were outside of its competence. Of course, any international ruling on the domes-

167. *Id*. at paras. 50, 57. The fact that the promulgation of a conflicting law alone amounts to a violation is not surprising, since Article 2 of the IACHR establishes the general obligation for all State parties to adapt their internal laws to the Convention.

168. *Id*. at paras. 22, 34.

tic legal effect of a law would have to directly address the relevant State organs, such as courts, to be meaningful. The IACHR, therefore, could not look into the box.

But, in 2001, the IACHR crossed these boundaries in the *Barrios Altos*[169] case, which focused on certain amnesty laws in Peru.[170] In 1991, six members of the Peruvian army attacked a group of civilians in a neighborhood in Lima known as Barrios Altos, killing fifteen civilians. Two amnesty laws then subsequently deterred investigation and prosecution of the matter.[171] Proceedings were initiated on behalf of the victims, first before the Inter-American Commission and then before the IACHR.[172] When the Fujimori government collapsed in 2000, Peru fundamentally changed its stance in the proceedings. It recognized its international responsibility in the case and declared its willingness to reach a friendly settlement with the petitioners, which could subsequently be approved by the Court under Article 52.2 of the Rules of Procedure.[173] The Court subsequently set out to determine the legal effects of the State's acquiescence, as well as appropriate reparations.

The Commission's delegate asked the Court *inter alia* to declare the incompatibility of the amnesty laws with the American Convention and the State's obligation to annul the amnesty laws.[174] The Court, however, went beyond the language of these requests and found that:

> Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they

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169. Barrios Altos, (Chimbipuma Aguierre et al. v. Peru), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001), 41 I.L.M. 93 (2002) [hereinafter *Barrios Altos*, Judgment]. *See also* Barrios Altos, Interpretation of the Judgment on the Merits, Inter-Am. Ct. H.R. (ser. C) No. 83 (Sept. 3, 2001) (available at http://www1.umn.edu/humanrts/iachr/C/83-ing.html) [hereinafter *Barrios Altos*, Merits]; Barrios Altos Case, Reparations, Inter-Am. Ct. H.R., (ser. C) No. 87 (Nov. 30, 2001), *available at* http://www1.umn.edu/humanrts/iachr/C/87-ing.html [hereinafter *Barrios Altos*, Reparations].

170. *See Barrios Altos*, Judgment, *supra* note 169, at para. 2.

171. *Id.* at paras. 4–19.

172. *Id*. at paras. 7, 19.

173. *Id*. at paras. 37–39.

174. *Id*. at para. 36.

> have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.[175]

Therefore, the Court decided unanimously that Amnesty Laws No. 26479 and No. 26492 were "incompatible with the American Convention on Human Rights and, consequently, lack[ed] legal effect."[176] This finding begs the question — in what sense did the Amnesty laws lack legal effect? Was it on the international plane or within the Peruvian legal order? The former interpretation would be peculiar since national laws are not normally said to have "legal effects" on the international plane. As the Court acknowledged in its 1994 Advisory Opinion, national laws can merely be determinative of relevant facts.[177] The latter interpretation would be no less peculiar, since it would mean that the Court would strike down a national law directly, instead of obliging the State to do so.

The IACHR's judgment is rather ambiguous in this regard, as demonstrated in the separate opinions attached by three of the Court's judges. Judge De Roux stated that "[a]s a consequence of the manifest incompatibility between self-amnesty laws and the American Convention on Human Rights, the State of Peru must abrogate these laws so that they do not continue to represent an obstacle" to the required prosecutions.[178] Thus, he interpreted the lack of legal effect as not automatically extending to the Peruvian legal order. Meanwhile, Judge Cançado Trindade observed that self-amnesty laws have "*no legal validity at all* in the light of the norms of international human rights law," but also that "the State has the obligation to cease the situation that violates fundamental human rights (by promptly abrogat-

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175. *Id*. at para. 44.

176. *Id*. at para. 51(4).

177. *See* German Interests in Polish Upper Silesia (F.R.G. v. Pol), 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25) ("From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.").

178. *Barrios Altos*, Judgment, *supra* note 169, at para. 42. (separate opinion Judge de Roux).

ing such laws),"[179] thereby bringing no greater clarity to the question. Finally, Judge Ramirez stated unequivocally that:

> [T]his incompatibility signifies that those laws are null and void, because they are at odds with the State's international commitments. Therefore, they cannot produce the legal effects inherent in laws promulgated normally and which are compatible with the international and constitutional provisions that engage the State of Peru. The incompatibility determines the invalidity of the act, which signifies that the said act cannot produce legal effects.[180]

Thus, contrary to Judge De Roux's opinion, Judge Ramirez interpreted the law's lack of legal effect as directly extending to the Peruvian legal order, while Judge Trindade's opinion is ambiguous in this regard.

While the judges themselves seemed divided on the precise scope of their holding, the judgment certainly can be read as an incursion into the Peruvian legal order, striking down the amnesty laws directly.[181] It is noteworthy that the operative paragraph contains no further pronouncement on the obligations of Peru with regard to the laws. If the lack of legal effect were restricted to the international plane, then surely the Court would have ordered the State to abrogate the laws, just as it decided that "the State of Peru should investigate the facts… and punish those responsible."[182] Instead, the Court simply declared that the laws lacked legal effect.

Even taking into account the acquiescence of Peru, the Court's ruling undoubtedly surpasses the normal functioning of an international human rights tribunal in determining the validity of a national law within the nation's own legal order. The Court's determination also exceeds the limits the Court itself formulated in its 1994 Advisory Opinion by requiring the obedience of the relevant Peruvian State organs.

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179. *Id*. at para. 11 (concurring opinion of Judge Cançado Trindade) (emphasis added).

180. *Id*. at para. 15 (concurring opinion of Judge Ramirez).

181. *See* Christina M. Cerna, *Judicial And Similar Proceedings — Inter-American Court of Human Rights: Barrios Altos Case (Chumbipuma Aguirre Et Al. v. Peru)*, Introductory Note, 41 I.L.M. 91, 92 (2002) (stating that the Court declared the amnesty laws "void of any legal effect.").

182. *See Barrios Altos*, Judgment, *supra* note 169, at para. 51(5).

Just weeks after the judgment of the Inter-American Court, the Peruvian Supreme Court decided to give effect to the judgment, "which resulted in the reopening of the Barrios Altos case at the national level and the rendering of the amnesty laws without effect."[183] While the Court referred to the authorization in Peruvian law to execute international court judgments,[184] it also relied on the Vienna Convention of the Law of Treaties in language that pointed to a broader obligation of State organs under international law:

> That Peru is a party to the Vienna Convention on the Law of Treaties, which establishes by its twenty-seventh article that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty," in the spirit of which, the Consejo Supremo de Justicia Militar, as an integral part of the Peruvian State, must comply with the international ruling in accordance with its terms and in such manner as to implement the decision it contains in its entirety, vesting it with full effect and eliminating any obstacle presented by substantive or procedural internal law that might stand in the way of its due execution and full performance....[185]

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183. Cerna, *supra* note 181, at 92. *See* Peruvian Supreme Court, Judgments of June 1, 2001 and June 4, 2001 (on file with author).

184. *See* Texto Unico de la Ley Organica del Poder Judicial (Peruvian), art. 151, *available at* http://www.Minjus.gob.pe (last visited Sept. 2, 2003). As Peruvian Supreme Court explained:

> Las sentencias expedidas por los Tribunales Internacionales, constituídos según Tratados de los que es parte el Perú, son transcritas por el Ministerio de Relaciones Exteriores al Presidente de la Corte Suprema, quien las remite a la Sala en que se agotó la jurisdicción interna y dispone la ejecución de la sentencia supranacional por el Juez Especializado o Mixto competente.
>
> [The decisions handed down by the international tribunals, constituted pursuant to the treaties to which Peru is a party, are communicated by the Ministry of External Relations to the President of the Supreme Court, who forwards them to the court where domestic jurisdiction was exhausted and orders the implementation of the supra national decision by relevant specialized or mixed-competent judge.]

Id.

185. Peruvian Supreme Court Judgment of June 4, 2001, unofficial translation by Mason Weisz [hereinafter Peruvian Supreme Court Judgment]. The original text reads as follows:

Much like the Malaysian High Court in *Cumaraswamy*,[186] the Peruvian Supreme Court displayed its conviction that courts, like other State organs, have an independent duty to comply with international law as it noted that the courts are "an integral part of the Peruvian State,"[187] making them equally responsible for the nation's international obligations.

When Peru later disputed the applicability of the nullification of amnesty laws to similar cases, the Inter-American Court in interpreting the judgment clarified that "the effects of the decision in the judgment on the merits of the Barrios Altos Cases were general in nature."[188] The direct interaction with State organs in the *Barrios Altos* case is not unique in the recent case law of the IACHR. In the *Ivcher Bronstein* case,[189] the Court held that "both the jurisdictional organs and those of any other nature that exercise functions of a substantially jurisdictional nature" are obligated to respect the guarantee of due process.[190] The Court formulated a similar due process obligation of all State organs involved in jurisdictional matters in the *Constitutional Court Case*.[191] In the *Cantos Case*,[192] the Court established

> Que, el Perú es parte de la Convención de Viena sobre Derecho de los Tratados, la misma que establece en su artículo veintisiete que "*no se puede invocar disposiciones de derecho interno como justificación del incumplimiento de un Tratado*," en tal sentido, el Consejo Supremo de Justicia Militar, como parte integrante del Estado Peruano, debe dar cumplimiento a la sentencia internacional en sus propios términos y de modo que haga efectiva en todos sus extremos la decisión que ella contiene, otorgándole plenitud de efectos y levantado todo obstacúlo de derecho material y procesal propios del derecho interno que impida su debida ejecución y su cumplimiento en forma integral.

Id. *Cf. Ekmekdjian v. Sofovich*, *infra* note 286.

186. *See supra* Part III.A.ii.

187. Peruvian Supreme Court Judgment, *supra* note 185.

188. *See Barrios Altos*, Judgment, *supra* note 169, at para. 18.

189. Ivcher Bronstein Case (Baruch Ivcher Bronstein v. Peru), Merits, Inter-Am. Ct. H.R. (Ser C) No. 74, para. 104 (Feb. 6, 2001) ("[T]he Court believes that both the jurisdictional organs and those of any other nature that exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of due process established in Article 8 of the American Convention.").

190. *Id*.

191. Constitutional Court (Aguierre Roca, Rey Terry and Revoredo v. Peru), Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 71, para. 71 (Jan. 31, 2001) ("[A]ny State organ that exercises functions of a materially jurisdictional nature has

a violation of the obligation of the judicial authorities involved to safeguard the right of access to the court system.[193] In the *Trujillo Oroza* case,[194] the respondent State itself indicated that it would welcome a similar intervention in the national legal order as in *Barrios Altos*.[195] To overcome the obstacle of a statute of limitations that prevented the required criminal proceedings, Bolivia suggested a judgment of the IACHR that would "amend or modify the decision of domestic courts."[196] However, this proved unnecessary since the Constitutional Court of Bolivia set aside the statute of limitations before the IACHR could do so.[197] In *Hilaire*,[198] the Court found that Trinidad and Tobago's Advisory Committee on the Power of Pardon "must resubmit the victim's case to the executive authority competent to render a decision regarding that mercy procedure."[199] Finally,

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the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.").

192. Cantos Case, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 97, para. 60, (Nov. 28, 2002).

193. The Court observed that:

> [I]n the case *sub judice*, [the] application of the filing fee and...professional fees strictly according to the letter of the law meant that exorbitant amounts were charged, with the effect of obstructing Mr. Cantos' access to the court....The judicial authorities should have taken appropriate steps to prevent this situation from materializing and [should have] ensure[d] effective access to the court and effective observance and exercise of the right to judicial guarantees and judicial protection.

Id.

194. Trujillo Oroza Case (Trujillo Oroza v. Bolivia), Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 92 (Feb. 27, 2002).

195. *Id*.

196. *Id*. at para. 93(a). Bolivia asserted that: "[I]t ha[d] no objection to those guilty of th[e] crime being tried…[nor] to the Court declaring some type of legal solution so that a judgment of the Inter-American Court [could] amend or modify the decision of [the] domestic courts." *Id.*

197. *Id*. at par. 107–108.

198. Hilaire, Constantine and Benjamin et al. Case (Hilaire v. Trinidad and Tobago), Merits, Inter-Am. Ct. H.R. (Series C) No. 92, para. 214 (June 21, 2002).

199. *But see id.* at para. 223(10) (Court unanimously declares that, "the State should submit before the competent authority and by means of the Advisory Committee on the Power of Pardon … the review of the cases.").

State organs, including courts, have directly referred to and obeyed the IACHR's orders in numerous cases.[200]

4. The International Criminal Tribunal for the former Yugoslavia

A traditional voice on the concept of State organ obligation exists in the case law of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The case to be discussed resulted from an order addressed to both Croatia and its Defense Minister to cooperate in certain matters regarding the case against Timohir Blaskic.[201] Croatia challenged the authority of the Tribunal to issue such a *subpoena duces tecum* in general, and to a State official in particular.[202] On July 18, 1997, the Trial Chamber dismissed Croatia's objections in a decision that is very much in line with the developments in other courts just described.[203] The Trial Chamber noted that Article 18(2) of the ICTY Statute[204] gave the prosecutor "express authority to deal with State 'authorities' in particular, rather than the State as an abstract entity."[205] The Tribunal reasoned that "States must always act through their officials and thus the authority to issue binding orders to States by necessary implication carries the authority to issue such orders to their officials."[206] In the

200. *See* PASQUALUCCI, *supra* note 108, at 330, 332–34, 338–39.

201. Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Prosecutor v. Blaskic, Case No. IT-95-14, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, July 18, 1997, at para. 6, *available at* http://www.un.org/icty/blaskic/trialc1/decisions-e/70718P2.htm (last visited Sept. 10, 2003) [hereinafter *Blaskic*, Objection].

202. *Id*. at para. 14.

203. *Id*. at para. 157.

204. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 18(2), May 25, 1993, 32 I.L.M. 1159, 1183 (1993) ("The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.").

205. *Blaskic*, Objection, *supra* note 201, at para. 67 ("[E]xpress authority to deal with State 'authorities' in particular, rather than the State as an abstract entity, and demonstrates that the International Tribunal is not required to proceed through designated State channels, but can approach those officials who are most directly responsible for compliance.").

206. *Id*. at para. 69.

same vein, the Tribunal considered that a State can only act through its officials and, therefore, their obligations must correspond to those of the State.[207]

While the decision concluded that "there is a clear obligation on both States and their officials to comply fully" with the Tribunal's *subpoenas*,[208] the Trial Chamber was not entirely unaware of the difficulties surrounding their holding. The decision discussed at length the difficulties that could arise if a State prohibited its officials from complying with orders of the Tribunal, concluding that in such circumstances, it may not be proper for the Tribunal to hold the official to her obligations.[209] Moreover, the decision ended with a remarkable description of the Tribunal's goals, as if the Trial Chamber felt it needed to supplement its legal reasoning with an appeal to effectiveness.[210]

Nevertheless, the ICTY Appeals Chamber was not impressed with the *Blaskic* holding and drastically reversed course just months later.[211] It found that Article 18(2) allowed the Prosecu-

207. *Id*. at para. 91. As the Tribunal specifically noted:

> [A] State has a duty to comply, a government official to whom a *subpoena duces tecum* is issued in his official capacity has a corresponding duty to comply. Indeed, it would be anomalous to consider that his duty is less than that of the State from which he receives his authority, since a State may only act through its competent officials.

Id.

208. *Id*. at para. 150.

209. *Id*. at paras. 92–96.

210. *Id*. at para. 154. The Tribunal explained that:

> The International Tribunal was established to aid in the restoration and maintenance of peace in the former Yugoslavia. As a criminal court, its primary obligation is to provide a fair and expeditious trial and to guarantee the rights of the accused. This adjudicatory process strengthens the rule of law, a fundamental principle shared by all members of the international community. If effective, this may contribute to reconciliation, which is a precondition for lasting peace. Thus, the Trial Chamber cannot endorse the contention that States and government officials have no obligation to comply with orders of the International Tribunal.

Id.

211. Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997, Prosecutor v. Blaskic, Case No. IT–95–14, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 29, 1997, *available at* http://www.un.org/icty/blaskic/appeal/d

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tor to seek the assistance of a particular State official, but did not imply a corresponding international obligation for that official to cooperate, stating instead that such an obligation "is only incumbent upon the State."[212] In more general terms, the ICTY Appeals Chamber found that international law protects the internal organization of the State, including the right to instruct its organs,[213] noting:

> [B]oth under general international law and the Statute itself, Judges or Trial Chambers cannot address binding orders to State officials....[I]t is indubitable that States, being the addressees of obligation[s of result], have some choice or leeway in identifying the persons responsible for, and the method of, its fulfillment. It is for each such State to determine the internal organs competent to carry out the order. It follows that if a Judge or a Chamber intends to order the production of documents, the seizure of evidence, the arrest of suspects etc., being acts involving action by a State, its organs or officials, they must turn to the relevant State.[214]

Therefore, the Appeals Chamber held that the Tribunal could address binding orders to States as well as private individuals, but not to State officials.

Much can be said to qualify the Tribunal's holding. The case predates the ICJ's decisions in *LaGrand* and *Cumaraswamy*, and thus could not take into account the clear determination of

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ecision-e/71029JT3.htm (last visited Sept. 2, 2003) [hereinafter *Blaskic*, Review].

212. *Id*. at para. 42.

213. *Id*. at para. 41. The Tribunal specifically stated:

> It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.

Id.

214. *Id*. at para. 43.

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State organ obligation in those cases. The question of whether officials can be subpoenaed is much more complex than the inquiry of their obligations under international law. First, directly addressing officials leaves the State uninformed and consequently unable to respond; a distinction from the ICJ decisions where the obligations of the State organs were communicated to the central government. Second, subpoenas are ultimately enforced by criminal sanctions, making them more intrusive than normal obligations under international law. Finally, it is significant that the Appeals Chamber noted that exceptions exist to the rule that customary international law protects the internal organization of States.[215] Yet, in light of the categorical language of the decision, and the holding that clearly sets State organs apart from States and individuals, it should be acknowledged that the ICTY ultimately declined to pierce the State veil and adhered closely to black-box theory.

In a later case, the Court was slightly less determined.[216] When Slobodan Milosevic challenged the validity of his arrest and extradition to the ICTY, the Trial Chamber was asked to declare his transfer unlawful.[217] According to the *amici curiae* in the case, the transfer lacked a basis in Serbian law, and the international obligation to transfer Milosevic lay with the Federal Republic of Yugoslavia, and not with its constituent part, the Republic of Serbia.[218] The Trial Chamber followed the *amici* in accepting that the obligation to cooperate with the Tribunal under Article 29 of the Statute was that of the Federal Republic of Yugoslavia, and not the Republic of Serbia.[219] Nevertheless, it found that Rule 58, which in turn refers to Article 29, applied and that the transfer was made in accordance with the statute's provisions.[220] The ruling, therefore, implied that the obligation of the State (the Federal Republic of Yugoslavia) was also the

215. *Id*. at para. 41. *See also* GAJA, *supra* note 19, at 4.

216. *See generally* Konstantinos D. Magliveras, *The Interplay Between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law*, 13 EUR. J. INT'L L. 661 (2002).

217. *Id*. at 669.

218. Decision on Preliminary Motions, Prosecutor v. Milosevic, Case No. IT–02–54, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Nov. 8, 2001, at para. 35, *available at* http://www.un.org/icty/Milosevic/trialc/decision-e/1110873516829.htm (last visited Sept. 2, 2003).

219. *Id*. at para. 43.

220. *Id*. at para. 46.

obligation of its constituent part (Serbia). Furthermore, the President of the Tribunal later praised "the resolve of the authorities of Serbia to comply with its international obligations arising out of Security Council resolution 827 and Article 29 of the Statute of the International Tribunal."[221]

5. Dispute Settlement in the WTO

The WTO operates within a classic black-box framework. The General Agreement on Tariffs and Trade ("GATT") of 1947 contains a federal clause in Article XXIV(12) which reads:

> Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.[222]

This provision reflects the fact that the obligations under the GATT of 1947 were limited to the State, and did not extend to its territorial organs. As the U.S. pointed out in the Preparatory Committee:

> [I]t is necessary to distinguish between central or federal governments, which undertake these obligations in a firm way, and local authorities, which are not strictly bound, so to speak, by the provisions of the Agreement, depending of course upon the constitutional procedure of the country concerned.[223]

However, the meaning of Article XXIV(12) turned out to be slightly more complicated than expected. Many found the interpretation of the GATT of 1947 as requiring nothing more than reasonable efforts in cases under the control of its territorial organs, regardless of outcome, as unsatisfactory, because it undermined treaty effectiveness.[224] Consequently, the unadopted 1985 Panel report on "Canada — Measures Affecting

221. ICTY Press Release, Address by his Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN General Assembly, U.N. Doc. JD/P.I.S./640–e (Nov. 27, 2001), *available at* http://www.un.org/icty/pressreal/p640–e.htm (last visited Sept. 2, 2003).

222. General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XXIV (12) [hereinafter GATT].

223. EPCT/TAC/PV/19 at 33, *cited in* GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 772 (6th ed. 1994).

224. *Id*.

the Sale of Gold Coins" rejected this interpretation.[225] According to the panel, Article XXIV(12) did not limit the applicability of the treaty provisions; rather, it merely limited the obligation of States to secure their implementation.[226] This reading was also adopted in the 1992 Panel report on "Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies."[227] The import of Article XXIV(12) was further reduced when the panel in "United States — Measures Affecting Alcoholic and Malt Beverages" (1992) concluded that based on the drafting history, the Article was designed to apply only to those measures of territorial organs which the central government is powerless to control.[228] Thus, where the State has no constitutional authority to force its territorial organs to comply with its GATT obligations, Article XXIV(12) releases the State from the strict obligation to secure compliance, but requires the State to make a reasonable effort to do so and imposes State responsibility for any breach. This interpretation was clarified in the Understanding on the Interpretation of Article XXIV of the GATT of 1994 that was adopted during the Uruguay rounds of the Multicultural Trade Negotiations.[229]

In WTO instruments and disputes, a firm distinction exists between the central State and its territorial organs. The WTO

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225. Canada — Measures Affecting the Sale of Gold Coins, Sept. 17, 1985, GATT Doc. L/5863, 1985 WL 291500 (unadopted GATT panel report).

226. *Id*. at paras. 53–64.

227. Canada: Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.) at 86–87 (1993) ("[T]he provisions of the General Agreement were applicable to measures by regional and local governments and authorities notwithstanding Article XXIV:12. This followed clearly from the obligation set out in this provision 'to ensure observance of the provisions of this Agreement' by such governments and authorities because a provision could only be 'observed' by a government or authority if it was applicable to it.").

228. United States Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 296 (1993).

229. *See* Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 para. 13, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 14, 1994, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, vol. 1 (1994), 33 I.L.M. 1125, 1163 (1994) ("Each member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.").

addresses all obligations to the State, which is responsible for any breach, even where it is constitutionally powerless to control its organs.[230] Therefore, the WTO practice firmly adheres to black-box theory.

IV. ANALYSIS

The case law presented above forms a diverse collection, involving different courts, different fields of law, and contentious judgments as well as advisory opinions. For the more recent decisions, it remains to be seen whether they will go down in the legal annals as exceptions or innovations. Still, analyzing those cases together sensitizes scholars to the fact that even the decisions that are exceptional in the case law of their courts fit a pattern of similar judicial thinking that can be found both in national[231] and international courts.

While the cases described do not amount to evidence of a wholesale rejection of black-box theory in international law, they do represent a growing challenge to the notion that international obligations bind only the State as an entity and not its organs. As noted, this occurrence is not a new phenomenon. However, the breadth of this trend and the authority of the international courts involved might now create a critical mass that will endure and eventually reverse the rule and exception regarding State organ obligation under international law. For particular categories of obligations and fields of law, for example human rights, the black-box theory may already be outdated.[232]

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230. *See, e.g.*, Australian Measures Affecting Importation of Salmon, WT/DS18/RW (Feb. 18, 2000), *available at* http://www.dfat.gov.au/trade/negotiations/disputes/wtodisputes-Australiasalmon.html (last visited Oct. 17, 2003).

231. *See supra* note 9.

232. *See* CASSESE, *supra* note 32, at 181; Bedjaoui, *supra* note 65, at 23. Bedjaoui may be overly optimistic in stating that:

> It is no longer conceivable that a national court should require authority to execute an international judicial decision. . . . [T]he barrier between international law and municipal law has collapsed in whole sectors of activity. The development of universal or regional organizations, and the appearance of certain elements of supranationality, have occasioned a more widespread *osmosis* of international decisions into the national legal order. It therefore comes as no surprise that,

The prospects for change are fuelled by material changes in international law that should be expected to develop rather than regress. In this section, we will first analyze how material changes in international law underlie the trend towards State organ obligation. Second, we will set forth an alternative model to black-box theory on the basis of the cases described. This analysis should be understood as just that: a view of the alternative to black-box theory among many possible others. Finally, we will briefly address some of the policy considerations involved.

A. Background: Change in Public International Law

That the character of international law has changed profoundly in the last century is a truism repeated to the point of becoming meaningless.[233] Still, this development is crucial for our understanding of the challenge to black-box theory and its prospects. The ICJ and other courts' attempts to pierce the State veil are both evidence and consequences of this change. This Article will paint the picture of international law's development only in broad strokes, focusing on four specific points of change: (1) the emergence of non-State subjects of international law; (2) international law's growing regulatory power; (3) the increased emphasis on the multilateral formulation of general rules; and, (4) international law's ever-growing accessibility and precision. While these points are strongly interconnected and partly overlapping, they provide an accurate portrayal of the legal transformation behind the cases relevant to this Article's analysis.

First, current international law includes many subjects besides the State. This change in itself places pressure on a conceptual framework that was shaped by the legal interactions of States alone.[234] Individuals, companies and international or-

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> at the present time, international judgments — and more particularly those of the European courts — are increasingly received both directly and automatically by the national courts.

Id.

233. For an early account, see WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW ivii (Columbia University Press, 1964).

234. *See* Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 20 (1985) ("A legal system developed over centuries to regulate relations between states must make consider-

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ganizations now have limited capacities to act on the international plane. These entities are also affected, directly or indirectly, more often than ever before by international law.[235]

Second, international law now regulates many subject matters previously under the exclusive control of the national legislator.[236] International law has come a long way from being "the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other."[237] The oft-described move from a law of coexistence to a law of cooperation has led to a vast expansion of topics covered by international law.[238] The *domaine réservé* is today more a relic than reality.

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able conceptual adjustments to accommodate the extension of its normative reach to individuals.") [hereinafter Buergenthal, *The Advisory Practice*].

235. *See* Pescatore, *Conclusion*, *supra* note 25, at 274. As Pescatore explains:

> International treaties in our time, with few exceptions, are of concern not only to the states as such…they have a direct bearing on the rights and interests of individuals, physical or corporate.…In contrast it is rather difficult to find treaties the effects of which could be contained entirely on the level of pure interstate relations.…We may thus take as a premise that, for the great majority of international treaties in our time, the way in which these treaties are executed and implemented by the contracting states in their internal order is of primary concern.

Id.

236. *See* John C. Yoo, *Globalism and the Constitution, Non-Self-Execution and the Original Understanding*, 99 COLUM. L. REV. 1955, 1956–58 n. 220 (1999); Walter Kälin, *Implementing Treaties in Domestic Law: From "Pacta Sunt Servanda" to "Anything Goes"?*, *in* MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN THE INTERNATIONAL LEGISLATIVE PROCESS 119 (Vera Gowlland-Debbas et al. eds., 2000).

237. PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 324 (Oxford University Press 1990).

238. *See* Michael Cottier, *Die Anwendbarkeit von Völkerrechtlichen Normen im Innerstaatlichen Bereich als Ausprägung der Konstitutionalisierung des Völkerrechts* [*The Applicability of International Law Norms in the Domestic Sphere as the Development of the Constitutionality of International Law*], 9 SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT [S.Z.I.E.R., SWISS JOURNAL OF INTERNATIONAL AND EUROPEAN LAW] 403, 413–15 (1999).

Third, international law is increasingly legislative and less a set of bilateral contractual relations between States.[239] This change can be witnessed not only in the content of treaties, but also in their form. The multilateral formulation of general rules has become a pivotal part of modern international law, ending the dominance of concrete, bilateral arrangements between States.[240] The increased importance of multilateral treaties is a relatively recent phenomenon.[241]

Fourth, and closely connected to the other changes, international law has become increasingly accessible and specific.[242] The proliferation rate of treaties in the last century puts any Petri dish to shame.[243] Treaties have grown in number, but also in precision, formulating both the desired results and how these results are to be achieved. No longer is it a rarity for a treaty provision to specify the actions to be taken by legislative, executive and/or judicial organs.[244]

These changes bring forth a growing rapprochment between national and international law. Professor Phillip Allott states that the convergence of subjects, topics and form leads to "the internationalizing of the national, the nationalizing of the international, and the universalizing of value," as well as the negating of "the structural duality" between national and interna-

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239. This process has a long history. *See* Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31, 43 (1999) ("As international society began to increase rapidly in complexity and density from, say, 1815, treaties began to perform a social function closely analogous to legislation in national legal systems.").

240. *See* Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS (LA HAYE) 217, 323 (1994).

241. *Id*.

242. *Id*. *See also infra* notes 246, 247.

243. *See* Louis B. Sohn, *Unratified Treaties as a Source of Customary International Law*, *in* REALISM IN LAW-MAKING: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN 231, 231 n.1 (Adriaan Bos & Hugo Siblesz eds., 1986) (stating that since 1945 more treaties have been adopted than in the 3000 years before).

244. *See, e.g.*, Convention on the Rights of the Child, art. 3, para. 1, G.A. Res. 44/25 (annex), U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/RES/44/49 (1989) (entered into force Sept. 2, 1990) ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.").

tional law.[245] In many respects, modern international law resembles national law more than it does the international law of a century ago.[246] A pertinent example is the law underlying the Consular Relations cases before the ICJ. International law regarding the assistance of consular officers to their nationals abroad has developed considerably in the last two centuries. Before the drafting of the Vienna Convention on Consular Relations, the subject of consular assistance was generally included in bilateral treaties in far less detail, if it was included at all.[247] The 1923 Treaty on Friendship includes an elaborate provision regarding Commerce and Consular Rights between the U.S. and Germany.[248] Article 11 of the Treaty reads:

> Consular officers, nationals of the State by which they are appointed, may, within their respective consular districts, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed at the capital may apply directly to the government of the country.[249]

This provision allows for consular assistance in very general terms, envisaging nationals as objects rather than subjects of the law, and specifically determines that any resulting differences should be resolved through the bilateral diplomatic channel. In comparison, the Vienna Convention moves consular as-

245. PHILIP ALLOTT, THE EMERGING UNIVERSAL LEGAL SYSTEM 33 (2002); *see also* GAJA, *supra* note 19.

246. *See* Yoo, *supra* note 236, at 1958 ("International agreements are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action."). *Cf*. Frowein, *The Implementation*, *supra* note 50, at 85–86 (noting that while the international and national legal systems remain separate, there is now an "interdependence of these legal orders…probably even more in the day-to-day practice of international as well as of State organs, including national courts….").

247. *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 17–18 (2d ed. 1991).

248. *See* Treaty of Friendship, Commerce and Consular Rights, Dec. 8, 1923, U.S.–F.R.G., 44 Stat. 2132.

249. *Id*. at art. XXI.

sistance to an entirely different level. While the Convention includes a similar clause on consular communication with the authorities,[250] Article 36 addresses consular assistance in great detail.[251] The differences in specificity and language are unmistakable. Consular assistance to detained nationals is now addressed in detail and established as a right, not only for the consular officer, but also for the detained individual.[252] In fact,

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250. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 38, 21 U.S.T. 77, 596 U.N.T.S. 261, 294.

251. *Id*. at art. 36. Article 36 states:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> > (a) [C]onsular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
> >
> > (b) [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
> >
> > (c) [C]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Id.

252. *See LaGrand*, 2001 I.C.J. 104, at para. 77. *But see* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (The convention's preamble states: "Realizing that the purpose of such privileges

the competent authorities of a receiving State now hold a corresponding duty to inform both the detainee and the consular post.[253] As a result, this provision bears greater similarity to national law providing rights for detained individuals than to the more contractual language of the old bilateral treaties.[254] While national courts are generally reluctant to attach far-reaching consequences to this development,[255] it is undisputable that a similar line of Consular Relations cases could not have come before the ICJ on the basis of older treaty provisions such as Article 11 of the 1923 treaty.

The growing similarities and intertwinement of national and international law makes their separation increasingly untenable. Pressure grows on actors in both fields to overcome formal barriers and to interact more effectively.[256] Courts are particularly affected by the evolution of treaties from mere contracts between nations towards statute-like law, since, as the U.S. Supreme Court stated in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[257]

Moreover, courts frequently feel the additional pressure to provide the only realistic chance of enforcement of the law in question. If they do not uphold the international rules, often-

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and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.").

253. *See* Cassel, *Judicial Remedies*, *supra* note 10, at 855–58.

254. For an extensive, but ultimately negative comparison with Miranda rights see *United States v. Lombera-Camorlinga*, 206 F.3d 882, 883–84 (9th Cir. 2000) (*en banc*).

255. *See, e.g.*, Bishop, *supra* note 69, at 13, 43 (Part II and Part IV).

256. *Cf.* Helfer & Slaughter, *supra* note 9, at 388. The authors note that:

> In democracies in which individuals are mobilized in support of the judgment of a supranational tribunal, compliance with that judgment becomes less a question of ceding sovereignty than of responding to constituent pressure. The [S]tate is no longer an interlocking set of government institutions in its domestic affairs, with sovereignty lodged in the people, and a unitary entity in its foreign relations, with sovereignty a fundamental attribute of its statehood. Instead, its internal and external face begin to mirror one another, as sovereignty becomes inextricably interwoven with accountability.

Id.; Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 188 (1993).

257. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

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times, as in *Breard* and *LaGrand*, no one else will.[258] After all, international law fits the traditional framework of self-help less everyday as individuals and international organizations are in principle incapable of taking any effective measures themselves to vindicate their rights, and States are increasingly constrained in their capacity to react independently to violations of international law.[259] Although national courts continue to let international obligations pass unvindicated in the majority of their decisions, the urge to give effect to otherwise unenforceable law can be observed where courts challenge barriers to their ability to give effect to international law.[260]

Of particular importance is the notion that international law is no longer inter-State law.[261] The monopoly of the State has been broken by the emergence of other subjects of international law, most importantly individuals. This development threatens the rule that international norms are *ipso facto* to be addressed to States only.[262] One possible response is "the idea that traditional inter-State law needs to be subsumed within a broader process in which old distinctions between public and private international law and between municipal and international law

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258. *See* Benvenisti, *Judges and Foreign Affairs*, *supra* note 9, at 424. *Cf.* CONFORTI, INTERNATIONAL LAW, *supra* note 9, at 4–5 (The "proliferation of international legal norms over the last forty years, however, has not led either to corresponding developments in international judicial decisionmaking or to corresponding procedures for the coercive enforcement of international rules.").

259. For example, States are constrained by free trade regulations, which inhibit economic countermeasures, and stricter rules on resorting to armed force.

260. See, for example, the dissenting opinion of Lord Nicholls in Briggs v. Baptiste [2000] 2 A.C. 40, 55. Lord Nicholls stated that he could not accept that the courts of Trinidad and Tobago were "powerless to act" in order to prevent Brigg's execution, exclaiming that:

> By acceding to the [American Convention on Human Rights] Trinidad intended to confer benefits on its citizens. The benefits were intended to be real, not illusory. The Inter-American system of human rights was not intended to be a hollow sham, or, for those under sentence of death, a cruel charade.

Id. Appeal taken from Trinidad & Tobago & The Appeal to Effectiveness, *in Blaskic*, Objection, *supra* note 201, at para. 154.

261. *See* PASQUALUCCI, *supra* note 108, at 327.

262. *See* Thomas Buergenthal, *The Advisory Practice*, *supra* note 234, at 20.

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are being steadily eroded."[263] If international law can look into the black-box to deal with individuals, then an inability to do the same with State organs is not self-evident.[264] In short, the material changes in international law will only be effective if they are accompanied by adequate procedural responses.[265] Since these changes provide the driving force behind the challenge to black-box theory, the pressure to "break the black-box" can be expected to increase further over time. Piercing the State veil may well prove to be an enduring adaptation of the procedural framework of international law, leading to greater efficacy of international norms.

B. An Emerging Alternative Model: State Organ Obligation

Our precursory reading of the alternative model of State organ obligation that may replace black-box theory can be summed up in five interrelated points: (1) international obligations oblige States as well as their organs; (2) States retain the international responsibility for international law violations in order to efficiently enforce international legal obligations; (3) the State retains a high level of control over the fulfillment of its international obligations; (4) a distinction should be made

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263. Andrew Hurrell, *Conclusion; International Law and the Changing Constitution of International Society*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 327, 338 (Michael Byers ed. 2000).

264. *See* GAJA, *supra* note 19, at 7 ("Should one accept the view that international law confers rights and obligations on individuals, it seems reasonable to hold that international law may also impose obligations on specific State organs.").

265. *See* Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT'L L. 427, 450 (1994). Eric Stein explains that:

> Despite the pervasive mutation in the international system, the state is not about to "whither away." Yet, because of this mutation, one may question the continued functionality of the rule that a state is free, subject only to the broad international "good faith" standard, to choose the ways and means of implementing a treaty to which it is a party, and specifically to determine whether a treaty should or should not directly apply in its internal legal order. Unfettered discretion in the hands of national political institutions is particularly problematic in the case of treaties aimed at granting rights to, and imposing obligations upon, individuals.

Id. See also Simma, *supra* note 240, at 325.

between State organs' positive and negative obligations; and (5) an alternative model needs to incorporate the reality that in case of conflicts State organs will generally continue to abide by national law at the State level rather than follow their international obligations.

First, the international obligations of State organs exist parallel to those of the State, not in isolation.[266] As a general rule, we can paraphrase the ICJ in *LaGrand* and say that organs are bound under international law to comply with the international undertakings of their States, whatever form they take.[267]

Second, international responsibility for a violation of international obligations must in principle still be invoked against the State as an entity. The fact that many international obligations can be fulfilled by different State organs, which oftentimes depend on each other to do so, makes it generally unfeasible to invoke the international responsibility of a specific organ. Neither Germany nor the U.S. would benefit if Germany was to invoke the responsibility of the U.S. government, the Governor of Arizona and the U.S. Supreme Court separately before the ICJ in a case like *LaGrand*.[268] Separate international responsibility seems desirable only when a violation can be attributed exclusively to one organ in limited circumstances. For example, it may be desirable when the organ in question is unwilling to remedy the violation and cannot be forced to comply by its central government, as in the case of the Manx legislature in *Tyrer*,[269] or in specific consent-based regimes.[270]

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266. *Cf.* Fitzmaurice, *supra* note 20, at 88 ("It is only by treating the State as one indivisible entity, and the discharge of the international obligations concerned as being incumbent on that entity as such, and not merely on particular individuals or organs, that the supremacy of international law can be assured — the atomization of the personality of State is necessarily fatal to this.").

267. *See LaGrand*, 2001 I.C.J. 104, at para. 32.

268. *But see* Peter J. Spiro, *Federalism and International Law: A Third Account*, *in* PROCEEDINGS OF THE 93RD ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 246, 247 (noting that: "[S]ubnational responsibility would...lead the states to respect international obligations within the sphere of their authorities.").

269. *See supra* Part II.

270. *Cf.* Art. 25 (1) and (3) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (allowing subdivisions to participate in arbitration in their own right with consent of their State).

That State responsibility remains unaltered does not preclude the invocation of State organ responsibility on the national plane. Where the responsibility of organs for their obligations under national law can be invoked, be it by individuals or by other organs,[271] there is no reason why the same could not be done for their international obligations.[272]

Third, the State, represented by the executive and the legislature, retains a high level of control over the fulfillment of its international obligations, for example, by implementing and enforcing legislation.[273] The fact that State organs are bound by the international obligations of their State does not mean that they are deaf to national instructions on how to fulfill those obligations.[274] The freedom of implementation remains largely intact, especially for less detailed obligations.

That the State normally preserves its controlling role is clearly shown in the final judgment in *LaGrand*.[275] While the circumstances surrounding the LaGrand brothers' executions warranted the pronunciation of the Governor of Arizona's obligation to halt the second execution, the ICJ recognized the freedom of the U.S. to determine how to remedy possible future violations.[276] The ICJ did not name any specific U.S. organs, but imposed a duty on the U.S. to allow review and reconsideration of future convictions in violation of the Consular Treaty by a means of its own choosing.[277] Similarly, the state's preservation of control was a determining factor in the *Subpoena* decision of the ICTY Appeals Chamber.[278]

Fourth, a distinction must be made between positive and negative obligations of State organs, as attempted by the Brus-

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271. *See* JEROME B. ELKIND, INTERIM PROTECTION: A FUNCTIONAL APPROACH 203–08 (1981).

272. *See* Beth Stephens, *Human Rights Accountability: Congress, Federalism and International Law*, 6 ILSA J. INT'L & COMP. L. 277, 285–86 (2000).

273. McFadden, *supra* note 8, at 32 (1995).

274. *See, e.g.*, Grootboom v. Oostenberg Municipality, 1999 (3) BCLR 277 (High Court of South Africa, Cape of Good Hope Provincial Division), *available at* http://www.law-lib.utoronto.ca/Diana/fulltext/groot.doc (last visited Oct. 6, 2003) (combining respect for international obligations with deference to the government in their implementation).

275. *LaGrand*, 2001 I.C.J. 104, at paras. 123, 124.

276. *Id*. at para. 124.

277. *Id*. at paras. 125, 128(6).

278. *Blaskic*, Review, *supra* note 211, para. 127.

sels Court of Appeals in *Vermeire*.[279] As shown in the comments of the ECHR on that decision, however, the line is not easily drawn.[280] Contrary to the common understanding of these categories, it is submitted here that the proper distinction in the context of State organ obligation is not between action and restraint from action, but between the implementation of an international obligation in general and the prevention of a specific, imminent violation of international law.

The latter, negative obligation must apply to all organs, regardless of the wording or content of the international norm.[281] Whenever a State organ is confronted with an imminent violation of international law in the normal conduct of its duties, it has an international obligation to prevent that violation by whatever action or omission lies within its authority.[282] Thus, the governors involved in *Breard*, *LaGrand* and *Avena* became the subject of negative international obligations that would otherwise not concern them because it was in their power to prevent an imminent violation.

On the other hand, the positive obligation to take general steps for implementation is more limited and depends on the specific content and language of the norm. The obligation must be specific enough to determine both the steps to be taken, and the organs that are to take them.[283] In order to determine whether these requirements are met, a factual determination is necessary in each specific case, taking into account the position of the organs involved and the context of the international obli-

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279. *Vermeire*, 214–C Eur. Ct. H.R. at para. 11.

280. *Id*. at para. 26.

281. *See* SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES, 1945–1986, 40 (1989) [hereinafter ROSENNE, DEVELOPMENTS].

282. *Cf. id*. at 39 ("It is axiomatic that a treaty, made between States, is binding upon each State as a whole, upon each one of its organs. This is implicit in the lapidary formulation of the *pacta sunt servanda* rule in article 26 of the Vienna Conventions."); Christian Tomuschat, *What is a "Breach" of the European Convention on Human Rights?*, *in* THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE, 315, 320 (R. Lawson et al. eds., 1994) [hereinafter Tomuschat, *What is a "Breach" of the E.C.H.R.?*].

283. The IACHR, for example, has given numerous orders that are so specific that they effectively result in direct communication between the Court and certain State organs. *See, e.g.*, *"La Nacion" Newspaper* case, Provisional Measures, 26 August 2002, paras. 2–3 (Costa Rican court asking the IACHR for clarification of an order to suspend a judgment). *See also* PASQUALUCCI, *supra* note 108, at 250–53.

gation.[284] Generally, positive obligations can be derived more often from obligations of conduct than from obligations of result,[285] but positive obligations cannot simply be equated to obligations of conduct.

The fact that a norm can be carried out by more than one organ does not preclude positive obligations, although it does make a resulting positive obligation less feasible. A specific enough norm may create simultaneous positive obligations, allowing different State organs to achieve the same result. The action of one disposes of the obligations of the other. In such cases, the time that has elapsed since the introduction of the international obligation and the inaction of the other organs involved may be taken into account in assessing the existence of positive obligations, as demonstrated by the Argentinean case of *Ekmekdjian v. Sofovich*.[286]

Article 14(1) of the American Convention of Human Rights establishes a right of reply to offensive public statements.[287] Argentina ratified the Convention in 1984, but subsequently failed to regulate the right of reply in its domestic law.[288] In 1988, the Argentinean Supreme Court ruled that it could not enforce the Convention in the absence of implementing law,

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284. *Cf.* Tomuschat, *What is a "Breach" of the E.C.H.R.?*, *supra* note 282, at 324 ("[T]he basic obligation, by meandering through different stages of elaboration and implementation, can take different substantive forms.").

285. *See* Draft Articles on State Responsibility, [1996] 2:2 Y.B. INT'L COMM'N 60, U.N. Doc. A/CN.4/SER.A/1996/ Add.1 (part 2), art. 20 and 21. These draft articles have not been included in the final Articles on State Responsibility of the ILC of 2001, but the distinction between obligations of conduct and result is implicitly reflected in the reference to the character of obligations in final article 12, and elaborated on in the Commentary.

286. Ekmekdjian v. Sofovich, CSJIN 315 Fallos 1492 (1992) (S.Ct. of Argentina) [hereinafter *Ekmekdjian*]. This Article's account of the case is largely based on Buergenthal, *International Tribunals*, *supra* note 9, at 695–99.

287. *See* Enforceability of the Right to Reply or Correction, Inter-American Court of Human Rights, Advisory Opinion OC–7/86 of August 29, 1986, Inter-Am. C.H.R., ser. A, No.7, para. 20 (1986) ("Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.").

288. Buergenthal, *International Tribunals*, *supra* note 9, at 695.

since the phrase "under such conditions as the law may establish" made Article 14 a non-self-executing provision.[289]

In the 1992, the Supreme Court of Argentina reversed course in the landmark decision of *Ekmekdjian v. Sofovich* and found that Article 14(1) was directly enforceable under Argentinean law.[290] In reaching this conclusion, the Court relied on an Advisory Opinion of the Inter-American Court,[291] the American Convention, the Vienna Convention on the Law of Treaties and the Argentinean Constitution.[292] The Court's reasoning was rather unorthodox.[293] The Court determined that the adoption of a law that conflicted with treaty obligations would infringe on the executive's treaty power and was, therefore, unconstitutional.[294] The Court departed from the then prevailing "last in time" rule and held that treaties override ordinary national laws.[295] Since the Vienna Convention on the Law of Treaties ranked higher than national law, the provision in Article 27 that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" effectively required all State organs "to accord normative priority to treaties and imposed on them the obligation to emit the necessary regulations to ensure that treaty provisions be fully implemented."[296]

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289. *See id*. (The 1988 case is Ekmekdjian v. Neustadt, Supreme Court of Argentina, Case No. E. 60. XXII, Judgment of December 1, 1988).

290. *Id*.

291. *Id*. at 696.

292. *See id*. at 697–99; *see also Ekmekdjian*, *supra* note 286, at paras. 17–21.

293. *See* Burgenthal, *International Tribunals*, *supra* note 9, at 697.

294. *See id*. at 698.

295. *Id*. at 697.

296. *Id*. at 698. *See also Ekmekdjian*, *supra* note 286, at para. 19. The Supreme Court of Argentina explained:

> Que la necesaria aplicación del art. 27 de la Convención de Viena impone a los órganos del Estado argentino asignar primacía al tratado ante un eventual conflicto con cualquier norma interna contraria o con la omisión de dictar disposiciones que, en sus efectos, equivalgan al incumplimiento del tratado internacional en los términos del citado art. 27.
>
> [That the necessary application of article 27 of the Vienna Convention places an obligation upon the organs of the Argentine State to give primacy to the treaty in the event that a conflict arises with any contrary provision of domestic law or in the event it has omitted to enact provisions and that such omission, in its effects, is tantamount

While relying in part on the Constitution, the Supreme Court stated, in broad language, that international law imposes extensive obligations on State organs.[297] The Court ruled that Article 2 of the American Convention, requiring States' parties to adopt "such legislative or other measures as may be necessary," includes appropriate judicial decrees as a means to give effect to the rights and freedoms in the Convention.[298] The Court, therefore, found itself under the obligation to remedy the inaction of the legislature and regulate the right of reply through such decrees.[299]

In *Ekmekdjian*, the right of reply was to be exercised "under such conditions as the law may establish."[300] This rule seemed to give rise to a positive obligation on the legislature (and possibly the judiciary branch) to establish a legal regime that allowed for the right of reply, and a negative obligation on all other organs to prevent specific violations of this right.[301] In its 1988 decision, the Argentinean Supreme Court deferred to the

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> to non-observance of the international treaty under the terms set out in article 27.]

Id.

297. *See* Buergenthal, *International Tribunals*, *supra* note 9, at 698.

298. *See id*. at 696–97.

299. *See id*. at 697–98. *See also Ekmekdjian*, *supra* note 286, paras. 20, 22. In more general terms, the Court held that:

> Que en el mismo orden de ideas, debe tenerse presente que cuando la Nación ratifica un tratado que firmó con otro Estado, se obliga internacionalmente a que sus órganos administrativos y jurisdiccionales lo apliquen a los supuestos que ese tratado contemple, siempre que contenga descripciones lo suficientemente concretas de tales supuestos de hechos que hagan posible su aplicación inmediata. Una norma es operativa cuando está dirigida a una situación de la realidad en la que puede operar inmediatamente, sin necesidad de instituciones que deba establecer el Congreso.

> [It should be borne in mind that when the Nation ratifies a treaty, which it has signed with another State, it is making an international commitment that its administrative and jurisdictional bodies will apply that treaty to the cases covered thereby, provided that it contains sufficiently specific descriptions of such cases to permit its immediate application. A rule is effective when it addresses an actual situation within which it can operate directly, without the need for institutions which have to be established by Congress.]

Id. at para. 20.

300. *Ekmekdjian*, *supra* note 286, at paras. 21–22.

301. *See* Buergenthal, *International Tribunals*, *supra* note 9, at 697–98.

legislature to establish a legal regime.[302] However, when in 1992 the legal regime had still not been enacted, the Court found that the inaction of the legislature prompted a positive obligation on the Court to regulate the right of reply.[303] Thus, the time elapsed, together with the failure of the legislature, strengthened the positive obligation of the Court to formulate a legal regime for the right of reply, also forming a logical corollary of the negative obligation of the Court to prevent a violation of the right in that specific case.[304]

Fifth, the international obligations of State organs will not trump national law at the State level, at least not in the foreseeable future.[305] In case of conflict, national courts and other organs generally will continue to follow national rules on the hierarchy of national and international law.[306] Of course, the familiar rule that national law cannot excuse the violation of an international obligation will apply, and favoring national law over international obligations will result in State responsibility on the international plane.

The lack of supremacy primarily serves as a practical prediction. States will resist the move from black-box theory to State organ obligation more vehemently when it is coupled with the automatic supremacy of international law on the national plane.[307] State organs will be hesitant to disregard the national law that instituted them and provides the most direct means of accountability.[308]

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302. *See supra* note 296.

303. *Id*. at 698.

304. *Id*. at 695–98.

305. As stated earlier, obligation and rank should be treated as two different issues. *See supra* Part II.

306. *Id*. *Cf.* Alford, *supra* note 48, at 736 ("If a statute admits of only one interpretation, courts must give effect to that interpretation, whether or not it violates a pre-existing international obligation.").

307. *See, e.g.*, HENKIN, *supra* note 31, at 150 (describing the U.S. refusal to follow international law when it is "inconsistent with the U.S. Constitution.").

308. *See* Reid v. Covert*,* 354 U.S. 1, 16 ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."). *Cf*. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 333 (1992) ("[C]ourts will often strive to seek a 'way out' from the rigidities and other policy problems they face when a…[direct application and higher status] rule exists in a legal system.").

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However, many scholars will also value the lack of supremacy of international norms on the national plane as an important check on the making and application of international law.[309] After all, the shortcomings of international law are well-known. Principal among them are a claimed lack of legitimacy, democratic or otherwise, and a lack of accountability of the actors that apply them.[310] These problems raise doubts regarding the desirability of an automatic superior status for the international obligations of State organs.[311] Moreover, withholding superior status might lead to closer interaction between national and international courts. This interaction can induce development and improvement of international law, as was demonstrated when the European national courts refused to uphold European law due to its lack of attention to human rights.[312]

At the same time, a lack of supremacy clearly diminishes the effects of State organ obligation. If international law developed to a more perfect state, supremacy would certainly be desirable. Until that time, a balance must be found between conflicting interests.[313] Organs will generally follow the commands of national law when it conflicts with international obligations, and occasionally will disregard national laws to favor international law. The development of a limited class of international obligations that do require supremacy on the national plane may develop, such as *jus cogens* norms. Again, this theory is one of several different possible scenarios. The likelihood and desirability of separate or parallel obligations of the State and its organs, the possible international responsibility of organs and the rank of their international obligations on the national plane are up for discussion and may change over time. Also, there are various open questions that will have to be determined in practice. Where do we draw the line between positive and negative obligations? To what extent should organs heed international obligations that do not immediately touch upon their daily routine?

309. *See* Jackson*, supra* note 308, at 340.

310. *See* Kälin, *supra* note 236, at 119*. See also* Turley, *supra* note 256, at 204–05.

311. Jackson, *supra* note 308, at 338 (advising "caution" in implementing higher status treaties).

312. *See supra* Part III.B.1.

313. For examples of different State systems, see Jackson, *supra* note 308.

State organs themselves will answer many of these questions. Understanding the full potential of the model of State organ obligation requires a change of perspective in approaching the addressees of international obligations. To return to our analogy of the walled town: the question normally posed is whether international law is allowed to look over the walls into the town. An equally valid and more constructive question is whether the organs inside the town are required or even allowed to ignore what is going on outside the town walls.[314] This perspective warrants a bottom-up, rather than a top-down approach. In other words, the issue is whether the model of State organ obligation provides a workable structure in practice for the organs themselves, not whether it can be imposed in full detail upon them.

When given the chance, State organs, especially courts, are often willing to look over the town walls and uphold international obligations. This phenomenon is evidenced by the experience in the European Union and the fact that courts all over the world already interpret national law in conformity with international law.[315] As argued earlier in this article, State organ obligation may play an important role in further promoting that willingness. This assertion is especially relevant with regard to judges, who are trained to distinguish binding norms from non-binding ones.[316]

More important, breaking the black-box effectively removes the barriers in many cases where organs already want to heed the call of international law. It reverses the current presump-

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314. *Cf*. Buergenthal, *International Tribunals*, *supra* note 9, at 698 (commenting on *Ekmekdjian* that since the Argentine Supreme Court "knew what Argentina's international obligations were, it thought it only proper to give effect to them.").

315. *See* Gerrit Betlem & André Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EURO. J. OF INT'L L. 569, 574–75 (2003); Benvenisti, *Judges and Foreign Affairs*, *supra* note 9, at 428.

316. Dieter Grimm, *Constitutional Adjudication and Democracy*, 33 ISR. L. REV. 193, 205 (1999) (stating "judges are bound to the prescribed norms, and their task is to discover the content of these norms and to apply them."). *Cf*. Finzer v. Barry, 798 F.2d 1450, 1460 (D.C. Cir. 1986) ("It would be quite improper for the judiciary to disregard international obligations that are inseparable from our nationhood.").

tion of non-validity of international obligations for State organs. Accordingly, the burden of proof shifts in favor of the application of international law. State organs must ask themselves not whether the State empowers them to obey international law, but whether the State prevents them from doing so. This development has three important effects.

First, even without supremacy, State organ obligation ensures the execution of international law where there is no conflict with national law, which, as noted, is often.[317] State organs continuously exercise discretion in the performance of their duties. Some of the highest national courts have discretion regarding whether or not they will review a case, while all courts exercise discretion from time to time when interpreting national law or filling a gap in the law.[318] The executive branch and legislatures' freedom to act is even more apparent. National law frequently instructs State organs to act in an equitable manner, giving them discretion that is to be applied in a reasonable way.[319] As Lord Scarman implied in *Attorney-General v. British Broadcasting Corporation*,[320] many violations of international obligations may be prevented if State organs are bound by international law in exercising their discretion.[321]

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317. *See supra* Part II.

318. For example, in the U.S., the Supreme Court has the ultimate ability to grant certiorari to hear a case.

319. *See generally* Attorney General v. British Broadcasting Corporation, 3 All E.R. 161 (H.L. 1980) (analyzing the case at hand in an equitable manner and noting the court's discretion in such matters).

320. *Id*.

321. *Id*. at 177–78 (noting that where a court had to decide a "question of legal policy," it had to regard and uphold the United Kingdom's international obligations under the Convention as interpreted by the European Court of Human Rights). *See also* Lord Butler-Sloss *in* Derbyshire County Council v. Times Newspapers Limited, 1 Q.B. 770, 830 (1992). In *Derbyshire County Council*, the Court explained:

> [T]he principles governing the duty of the English court to take account of article 10 [ECHR] appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. Consequently, the law of libel in respect of individuals does not require the court to consider the Convention. But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but…obliged to consider the implications of article 10.

Second, State organ obligation eliminates many violations of international law that are caused by negligence rather than an intent to breach. States regularly fail to implement their obligations not because they oppose them, but because they are not aware of all of the steps to be taken, their legislative process is too slow, or simply because they have other priorities.[322] When international obligations address State organs directly, the unintended absence of a national "trigger" no longer precludes their execution. Of course, State organs can still be negligent, but when each organ itself is addressed by international law, chances increase that failure to respect the law by one organ will be remedied by others.

Third, in cases where States do want to preclude the execution of their international obligations, they will have to act. State organs, especially courts, often lack the political agenda of the central government that determines the course of action of the State.[323] While this problem sometimes works to the detriment of international law, (for example, in the Consular Relations cases); on other occasions, it makes specific organs more vigilant than their State in the treatment of international obligations, (for example, as demonstrated in the *Pinochet* case). Under the black-box theory, States can simply ignore inconvenient international obligations, knowing that their courts and officials will do the same.[324] Under a model of State organ obligation, States will have to issue explicit instructions to their organs in order to prevent the application of a given international norm. This scenario facilitates both the determination of violations of international law and their redress on the international plane.

C. Policy Considerations

From the standpoint of international law the concept of State organ obligation provides a welcome opportunity to improve

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Id.

322. *See, e.g.*, *Ekmekdjian*, *supra* note 286, at para. 20; *Vermeire*, 214–C Eur. Ct. H.R. at paras. 10, 24 (containing situations in which national courts applied international law as a means of rectifying a flaw or omission in domestic law where the legislature was negligent rather than opposed to the international obligation).

323. *See* Helfer & Slaughter, *supra* note 9, at 335.

324. *See* Stephens, *supra* note 272, at 293–94.

compliance, but its impact on the national legal order raises profound questions.[325] Some of these are flaws of international law itself, like the lack of democratic legitimacy, accountability, precision and completeness.

An additional factor that may raise doubts as to whether it is desirable to have State organs directly obligated to obey international judgments is the possibility of error in those judgments. Such an error may result either from the present imperfect and unsystematic state of international adjudication or the distance between international adjudicators and local situations, and cannot generally, in the absence of correctional mechanisms, be easily remedied.[326]

Additionally, some may protest that the concept of State organ obligation threatens State autonomy. The black-box theory is generally supported with reference to the sovereign equality of States and the autonomy they need to represent their interests on the international plane.[327] The direct obligation of State organs is thought to infringe on the State's right to execute international obligations in the way it deems most suitable.[328] As

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325. *See* Justice Michael Kirby, The Road From Bangalore, The First Ten Years of Bangalore Principles on the Domestic Application of International Human Rights Norms, Address before the Conference on the 10th Anniversary of Bangalore Principles (Dec. 28, 1998) (transcript *available at* http://www.lawfoundation.net.au/resources/Kirby/papers/19981226_html (last visited Sept. 10, 2003)).

326. *See* Philippe Sands, *After Pinochet: The Proper Relationship Between National and International Courts*, *in* THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY: LIBER AMICORUM GEORGES ABI-SAAB 699, 714–15 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., Kluwer Law International 2001); Martti Koskenniemi, *The Post-Adjudicative Phase: Judicial Error and Limits of Law*, *in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJ/UNITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT 347–57 (Connie Peck & Roy S.K. Lee eds., 1997). *See also* the opinion of Justice Richardson in R v. Jefferies [1994] 1 N.Z.L.R. 290, 299. *Cf.* Cassel, *Judicial Remedies, supra* note 10, at 886–87.

327. *See Blaskic*, Review, *supra* note 211, at para. 41.

328. *See* McFadden, *supra* note 8, at 47. McFadden concludes that:

> [The] black-box theory makes a great deal of sense, from a global perspective, because it recognizes both the fact and legitimacy of states having organized themselves in different ways. It would be an unwarranted interference in domestic affairs, as well as impractical, to require that specific institutions carry out international obligations.

a reaction to this threat to State autonomy, States may be more reluctant to enact international law.[329]

Finally, there is the distorting effect of State organ obligation on the internal relationship between the organs in matters of federalism and the separation of powers. This distortion may allow the executive to overstep its authority, for example by imposing undue obligations on courts via treaties.[330] In the same vein, the balance of powers between the federal government and the states may be disrupted. Therefore, mediation by the legislature might be required to prevent organs that make or apply international law from asserting an unwarranted dominance over others.

All these concerns are mitigated to a great extent by the rather conservative reading of State organ obligation introduced earlier in this Article. The fallout from the breaking of the black-box will be limited, because the State will retain vast control over the implementation of its obligations.[331] Nonethe-

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Id. McFadden also proceeds to point out that the black-box theory's application is flawed when applied to the internal organization of the U.S. It is to be noted, however, that his rejection of the theory rests largely on the specific constitutional structure of the U.S. and not on the normative force of international law itself. *Id*. Therefore, in the specific case of the U.S., McFadden argues that the State-created exceptions defeat the rule, but does not render the black-box theory obsolete in general. *Id*.

329. *See* Jackson*, supra* note 308, at 331. *But see* Michael Kirby, The Impact of International Human Rights Norms — A "Law Undergoing Evolution," Judge's Conference (Mar. 11, 1995), *available at* http://www.lawfoundation.net/au/Resources/kirby/papers/19950311_tempo.html (last visited Sept. 2, 2003)). As Michael Kirby explains:

> Giving effect to international law where a country has formally ratified a relevant treaty, does no more than give substance to the act which the executive government has taken. The knowledge that the judicial use of international law in this way is now becoming more frequent may have the beneficial consequence of discouraging ratification where there is no serious intention to accept, for the nation, the principles contained in the treaty.

Id.

330. Or vice versa; *see* ROGERS, *supra* note 42, at 215 ("To say that the courts have an additional body of "higher law" to apply, to be found in the whole amorphous body of customary international law, is to inject an enormously distorting overdose of additional power into the Judicial Branch.").

331. *See, e.g.*, *Grootboom*, 1999 (3) BCLR 277; *see also* Jackson, *supra* note 308, at 334–38 (explaining various approaches to limit the automatic supremacy of international law).

less, concerns about sovereignty and supremacy are real, as demonstrated by the strong reaction of the Australian legislature to the famous *Teoh* case.[332] The Australian High Court's holding in *Teoh,* which stated that unincorporated treaties can give rise to legitimate expectations of individuals that administrative decisionmakers will respect the treaty, provoked a fierce debate on the place of international law in the national legal order. The opposition of the Australian legislature to the doctrine of legitimate expectations reflected serious concerns about national control over the domestic effects of international law and the proper balance between the different branches of government.[333] While these problems cannot properly be discussed within the limits of this Article, two observations seem pertinent.

First, none of these problems is the immediate result of a move towards State organ obligation. They are existing problems that play out sharper in a model of direct, rather than indirect obligation. For the flaws in the law itself, this is obvious. The autonomy of States in implementing their international obligations is limited because States have consciously chosen to restrict their autonomy by enacting treaties that formulate specific demands for their implementation. Moreover, international law not only prescribes how the internal organization of a State is to be used for the implementation of specific obligations, it is also in the process of formulating more general demands on the State in shaping its internal organization.[334]

Likewise, the tension between federalism and an effective approach to international law[335] results from the material devel-

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332. Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273. *See* Jonathan Todres, *Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 187–88 (1998) (on the introduction of legislation to reverse the doctrine of legitimate expectations in *Teoh*).

333. *See* David Kinley & Penny Martin, *International Human Rights Law at Home: Addressing the Politics of Denial*, 26 MELB. U. L. REV. 466, 467 (2002).

334. *See* T.M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); UCP of Turkey v. Turkey, 26 Eur. Ct. H.R. 121, 148 (1998) ("Democracy is without a doubt a fundamental feature of the European public order...Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.").

335. *See, e.g.*, Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Andrew Byrnes &

opments in the law rather than from a direct form of obligation.[336] Traditional divisions of powers, whether federal or among different branches of the central government, do not go well with "the internationalising of the national and the nationalising of the international."[337] The growing content of international law has brought more power to the central government, in particular to the executive, than just the administration of foreign affairs.[338]

Second, while providing some concrete alleviation of these problems, the indirect model of obligation also perpetuates them by removing an incentive for more structural change. Whether black-box theory is more harmful than helpful is a legitimate question, even taking into account the very problems it is believed to mitigate. The remedy of black-box theory is largely a placebo effect. We are oddly comforted by the idea that imperfect international law passes through the hands of the legislature before it becomes "real law" in our daily lives. As long as international law is "outside" the State, and dependent on our own lawmakers to get in, its imperfections are considered less troubling.

However, this sense of security is misleading. In practice, the role of implementing legislation is too constrained to remedy serious flaws that result from the drafting or application of international law.[339] There is too much pressure and too little

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Hilary Charlesworth, *Federalism and the International Legal Order: Recent Developments in Australia*, 79 AM. J. INT'L L. 622 (1985); Stephens, *supra* note 272, at 277.

336. *See* Kälin, *supra* note 236, at 124; Stephens, *supra* note 272, at 292–94.

337. Allott, *supra* note 245, at 33. *See* Byrnes & Charlesworth, *supra* note 335, at 623; Brilmayer, *supra* note 335, at 330–31.

338. *But see* ROGERS, *supra* note 42, at 33 ("[T]he conduct of foreign affairs is conducted by the political branches in our system, and international law practice is in reality a part of the conduct of foreign affairs.").

339. *See* Kälin, *supra* note 236, at 123 ("[W]hile the legislature is involved in the treaty process, its members have no influence on the content of treaty law. Rather, the role of democratic decisionmaking is reduced to saying 'yes' or 'no' to a text negotiated by the executive."). *See also* Peter J. Spiro, *Treaties, Executive Agreements and Constitutional Method*, 79 TEX. L. REV. 961, 1003 (2001). Spiro concludes from the problems of legislating on existing international obligations that:

> [B]ecause the domestic effectiveness of trade agreements will always depend on implementing legislation, the House should be included in

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leeway for the legislature to significantly curb the increased treaty-making power of the executive branch, especially since the power of the executive branch is broader than just the drafting of the treaty text that subsequently passes through the hands of the legislature.[340] As for content, a meaningful departure from the international obligation to be implemented will quickly lead to a violation on the international level. Of course, a rubber-stamping policy that leaves no substantial choice, even when implemented by the greatest democracies, does little to further the legitimacy of international obligations.

The problems under discussion require structural adjustments — either in the making of international law or in the manner States deal with international law. The material changes in international law have prompted the first steps towards such adjustments, but not much more. Federal States, for example, have established or enhanced the participation of their state governments in international relations in various ways.[341] However, these changes have primarily been gradual and not the adequate rethinking of the appropriate division of powers needed to fit the new reality that international law can no longer simply be equated to foreign affairs.[342] An important factor in this lack of fundamental change is the air of protection

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> decisionmaking before an international obligation is perfected. That is, the House should not be presented with an international fait-accompli, which would limit its discretion as a political if not a constitutional matter to consider the obligation before it is entered into, and before its rejection would result in a breach with possibly serious costs for the nation.

Id.

340. Uncontrolled by the legislature, the executive can alter obligations under a treaty by unilateral statements. *See* W. Michael Reisman, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE J. INT'L L. 316, 319–20, 329 (1990).

341. S*ee* Kälin, *supra* note 236, at 127–28 (describing the participation in treaty-making of sub-State governments in European countries). *See also supra*, note 37 on the role of sub-State entities in treaty-making.

342. *See* Kirby, The Road From Bangalore, *supra* note 325 ("Federal constitutions must themselves adapt to the world in which the federal state now finds itself. This, indisputably, is a world of increasing interrelationships in matters of economics and of human rights. Judges, no more than legislatures and governments, can ignore this reality."). *Cf*. Swaine, *supra* note 122, at 533 ("The legal trappings of global affairs, including the principle of good faith, should not be ignored...attention must be paid to their implications for the international function of federal government.").

that emanates from the idea that international law only takes effect within a State through a permissive rule of national law.[343]

States are probably more willing to confront the flaws in international law and structural adjustments in their division of authority with respect to international law when the effects of that law appear more directly. A cautious, gradual move towards State organ obligation may, therefore, be a welcome catalyst to a more vigorous approach to existing problems rather than a source of new tensions between international law and national actors.

V. CONCLUSION

The international obligations of State organs form a peculiar topic of academic debate. Everyone agrees that "the State" is bound by its international obligations, but the unison ends with this meaningless abstraction. While some scholars insist that organs, as part of the State, are bound by international obligations, other scholars are equally emphatic in their denial of State organ obligation. The latter are undoubtedly in the majority. Both in theory and in practice, the State is still predominantly treated as a black-box, which shields its organs from the reach of international law.

We have, however, brought together a diverse set of judgments from international courts that challenge the black-box view of international law. While not a new phenomenon, the speed of this change is increasing. The involvement of different international courts, in addition to domestic courts, represents a further step away from black-box theory. The material changes in international law, which fuel the drift away from black-box theory, make it likely that this trend will continue.

We have laid out a rather conservative model of State organ obligation that may change places with black-box theory and become rule rather than exception. Many aspects of State organ obligation, such as separate international responsibility for State organs and the relationship between international and national obligations of State organs, warrant further discussion and may develop over time. Also, further refinement of the con-

343. *See* HENKIN, *supra* note 31, at 153.

cept of State organ obligation requires that a distinction be made between different forms of obligation and different State organs. This Article has taken a rather broad approach to State organ obligation in order to give a wide-ranging overview of relevant developments.

Eventually, direct obligation of State organs under international law will improve compliance with international law. Direct obligation also has its drawbacks, but these could well prove to be a blessing in disguise by providing a stronger impetus for States to remedy deficiencies both in international law and their handling of it. In any case, the trend towards State organ obligation is real, relevant and deserves further attention.