International Law and US Courts: The Myth of Lohengrin Revisited

Andrea Bianchi*

Abstract

This paper attempts to shed light on the current attitude of US courts towards international law. Regardless of the formal instruments of incorporation, the extent to which international law is used by courts within the formal constraints of constitutional provisions largely depends on the legal culture prevailing at any particular time. This sketchy and selective overview of the attitude of US courts unveils a tendency to frame international law within the general framework of the constitutional law discourse. The main tenets of American constitutionalism such as separation of powers and federalism often shape the posture of courts in determining issues bearing on international law. The different nature of international law and its potentially pervasive effects on domestic law are frequently a cause for US courts to reject its proper implementation. At the base of this attitude, which seems to be the prevailing one at the moment, lies the perception that the fundamental postulates of the domestic legal order, as enshrined in the Constitution, cannot be altered by a body of law which does not exclusively emanate from the national societal body.

1 A Look from Outside

The study of the relation of municipal and international law has long been the monopoly of specialists professionally linked to a particular jurisdiction. US international lawyers traditionally deal with issues of incorporation within the US; their French colleagues, in turn, are the sole repositories of the treatment of how international legal norms are incorporated and implemented within the French municipal legal system, and so on. Rarely have members of the profession ventured

* Professor of International Law, Graduate Institute of International Studies, Geneva, and the Catholic University, Milan. The author expresses his gratitude to Professor Detlev F. Vagts of Harvard Law School for his comments on this article.

into the assessment of other countries' mechanisms of incorporation.[1] With a few exceptions,[2] this exercise is carried out by those who have a certain familiarity with the particular jurisdiction concerned and, therefore, master not only international law but also municipal law. This is perfectly logical, given that the technical complexities and sinuosities of constitutional and statutory law may not be so easily grasped by those who have not been educated in and do not operate professionally within the jurisdiction. Cross-references of a general or specific nature are occasionally made among jurisdictions belonging to the same legal tradition, but, overall, issues of incorporation remain strictly within the realm of domestic law and practices.[3]

The assumption of the irrelevance of domestic law to international law, asserted in a panoply of international judicial precedents and normative instruments,[4] further reinforces the presumption that incorporation mechanisms come rarely within the purview of the profession. Although international law textbooks almost invariably have a section devoted to the relation of international law to municipal law,[5] the

[1] It suffices to take a look at the courses of the Hague Academy of International Law to see that the subject of the relationship of international law to domestic law has been only sporadically treated. See for example: Triepel, 'Les rapports entre le droit interne et le droit international', 1 *RdC* (1923-I), at 73 *et seq.*; Kelsen, 'Les rapports de système entre le droit interne et le droit international public', 14 *RdC* (1926-IV), at 227 *et seq.*; Dickinson, 'L'interpretation et l'application du droit international dans les pays anglo-américaines', 40 *RdC* (1932-II), at 305 *et seq.*; Mirkine-Guetzévitch, 'Droit international et droit constitutionnel', 38 *RdC* (1931-IV), at 307 *et seq*; Waltz, 'Les rapports du droit international et du droit interne', 61 *RdC* (1937-II), at 375 *et seq.*; De Visscher, 'Les tendences internationales des Constitutions modernes', 80 *RdC* (1952-I), at 511 *et seq.*; Oliver, 'The Enforcement of Treaties by a Federal State', 141 *RdC* (1974-I), at 331 *et seq.*; Sperduti, 'Le principe de la souveraineté et le problème des rapports entre le droit international et le droit interne', 153 *RdC* (1976-V), at 319 *et seq.*; Cassese, 'Modern Constitutions and International Law', 192 *RdC* (1985-III), at 331 *et seq.*; Arangio-Ruiz, 'Le domaine réservé. L'organisation internationale et le rapport entre droit international et droit interne', 225 *RdC* (1990-VI), at 9 *et seq.*; Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', 235 *RdC* (1992-IV), at 303 *et seq*. For a quick overview of the general courses offered at the Hague Academy see R. Kolb, *Les cours généraux de droit international public de l'académie de La Haye* (2003).

[2] See, for instance, B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic* Courts (1997); F. G. Jacob and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (1997); M. Leigh, M.R. Blakeslee and L. B. Ederington (eds.), *National Treaty Law and Practice*, vol. I (1995) and vol. II (1999).

[3] For a relatively rare example of comparative analysis in this area see L. Erades and W. L. Gould, *Relations Between International Law and Municipal Law in the Netherlands and the United States* (1961).

[4] See Partsch, 'International Law and Municipal Law', II *EPIL* (1995) 1185. As regards international case law, reference can be made to *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v Poland) (Merits), 1926 PCIJ Ser. A, No. 17; *Case Concerning the Rights of Nationals of the United States of America in Morocco* (France v US), 1952 ICJ 176; *Advisory Opinion on Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (PLO Observer Mission Case), ICJ Reports (1988), at 12, para. 57: 'It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law.' See also Article 27 of the Vienna Convention on the Law of Treaties.

[5] See for some recent examples R. K. Gardiner, *International Law* (2003), at 129 *et seq.*, Denza, 'The Relationship between International and National Law', in M. D. Evans (ed.), *International* Law (2003), at 415 *et seq.*; A. Cassese, *International Law* (2001), at 162 *et seq.*; P. Malanczuk, *Akehurt's Modern Introduction to International Law* (7th rev. ed., 1997), at 63 *et seq.*

treatment of the subject remains descriptive and often limited to categorizing the main legal systems as monist or dualist in their approach to incorporation. The formal aspects of incorporation of international law within the US legal system are well known, as is its alleged conformity to the dualist tradition. According to the Constitution, the President 'shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.' (Article II § 2).[6] These treaties are the 'supreme law of the land' (Article VI) and prevail over state law. Some doctrines, peculiar to the US, which may be relevant to incorporation, are also fairly well known to the outside. It suffices to mention the *vexata quaestio* of the self-executing character of treaty provisions or such judicially-made doctrines as the 'act of state' and 'political question' doctrines that emanate from separation of powers concerns and may occasionally affect the way in which courts handle international law issues. [7]

The scant attention traditionally devoted to the implementation of international law in municipal legal systems is a cause for regret. Besides the consideration that municipal law might occasionally make up for the paucity of mechanisms of enforcement in international law,[8] the way in which domestic jurisdictions deal with international law in their day-to-day practice is revealing of their overall perception of the international legal order and its relevance. This is all the more so if one looks at the attitude of municipal courts. Numerous factors concur in determining the attitude of courts towards international law, formal mechanisms of incorporation being just one of them. International law can be given effect directly or indirectly by means of interpretation. Arguments based on international law can be perceived as either relevant or irrelevant for the interpretation of domestic law, which, in turn, may depend on the judges' familiarity with international law or lack thereof as well as on the prevailing legal culture which at any given time shapes the attitude of the legal profession at large.

My intention in writing this article is to provide a few insights on the way in which US domestic courts deal with international law, with a view to speculating, more generally, on the perception of the role of these courts in administering its application. This is not done in a thorough or systematic way, but, rather, by selectively looking at some areas and doctrines which have been deemed more revealing than others of the general attitude of the US judicial system towards international law. Looking sparingly into the case law of a country might taint such analysis with arbitrariness and prejudice. By selecting some areas or topics to the detriment of others, by focusing on some doctrines while neglecting others, one inevitably leaves oneself open to criticism. Yet those impressions that remain as representations of the overall reality of the object of observation are often drawn from a partial look at the whole. Just as the

[6] For a general overview see A. Bradley and J. L. Goldsmith, *Foreign Relations Law. Cases and Materials* (2003) and J. J. Paust, *International Law as Law of the United States* (1996).

[7] On such doctrines see G. Born, *International Civil Litigation in United States Courts* (3rd ed., 1996), and L. Henkin, *Foreign Affairs and the United States Constitution* (2nd ed., 1996).

[8] See B. Conforti, *International Law and the Role of Domestic Legal Systems* (1993), at 3 *et seq*. By the same author see also 'Cours général de droit international public', 212 *RdC* (1988-V), at 9 *et seq*.

impressionist's paintbrush is taken up with giving a general effect without elaborate detail, the present article has the goal of leaving the reader with no more than a general impression after looking at the contemporary operation of the US judicial system *vis-à-vis* international law.

A final remark on the title of the paper may be appropriate. Reference to the myth of Lohengrin is simply meant to capture the essence of how one relates to diversity of origin and nature. The aura of mystery and attraction surrounding Lohengrin creates the desire to approach him to learn more about his nature. Fatally, however, the revelation of his true identity causes Lohengrin to disappear. Out of the metaphor, one has the impression that the different nature of international law and its potentially pervasive effects on domestic law are often a cause for the US legal system to reject its proper implementation. At the base of this attitude, which seems to be the prevailing one at the moment, lies the perception that the fundamental tenets of the domestic legal order, as enshrined in the Constitution, cannot be altered by a body of law which does not exclusively emanate from the national societal body.

2 The Uncertain Status of Customary International Law and its Practical Consequences

It might seem ill advised to venture into the technicalities of the status of customary international law within the US legal system as a starting point. Yet the subject is quite revealing of the attitude of a legal system to international law as a whole. Since customary rules are binding on states regardless of their express consent, the status of such rules within the domestic legal order provides some evidence of the relevance attributed to 'external' law-making sources. There is hardly any mention in the US Constitution of customary international law. Except for the 'define and punish clause' of Article I, Section 8, the Constitution remains silent on customary law in both Article III and VI. Some commentators have argued that this is not decisive as the drafters may have intended that such an expression as 'Laws of the United States', as it appears in Article III, may well encompass customary international law.[9] Be that as it may, the framers of the Constitution and the early jurisprudence of the Supreme Court showed a certain sensitivity to the way in which international law was incorporated into the US legal system and applied by courts.[10] This attitude is epitomized in the well-known and much-quoted passage from *The Paquete Habana*, in which Justice Gray, echoing language he had used a few years earlier,[11] held that 'international law is part of our law and must be ascertained and administered by the courts of justice of

[9] See Dodge, 'The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context', 42 *Va. J. Int'l L.* (2002) 687, and Ramsey, 'International Law as Part of Our Law: A Constitutional Perspective', 29 *Pepp. L. Rev.* (2001) 187.

[10] See *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 111, Introductory Note [hereinafter *Restatement*].

[11] *Hilton v Guyot*, 159 U.S. 113 (1895), at 163.

appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination'.[12]

The idea that federal courts may resort to customary international law, in the absence of controlling federal statutory provisions, remains the prevailing view and was adopted in the latest version of the *Restatement*.[13] According to the *Restatement*, customary international law enjoys the status of federal common law and cases arising under it are to be considered as cases 'arising under' the Laws of the United States, 'for purposes of both the "judicial Power" of the United States (Article III) and the jurisdiction of the federal district courts (28 U.S.C. §1331)'. The supremacy of customary international law over state law can be grounded on an expansive interpretation of the Supremacy Clause of Article VI or on considerations that the United States enjoys exclusive authority in international relations.[14] The practical consequences of this supremacy are somewhat limited by the fact that rarely would customary law rules be construed as conferring rights directly on individuals and companies which could be enforceable by courts. However, recognition of customary law as part of the law of the United States, which can be administered by courts of appropriate jurisdiction, gives international law rules not strictly based on consent an internal legitimacy that they would not have otherwise.

The proposition that international customary law amounts to federal common law has been called into question by some strands of US scholarship.[15] Although not fully unprecedented,[16] these attacks have recently challenged with renewed vigour the constitutional foundations of the doctrine of customary law as federal common law as well as its desirability in terms of normative and judicial policy. At the heart of what have been termed 'revisionist theories' lies a different reading of *Erie R.R. v Tompkins*,[17]

[12] *The Paquete Habana*, 175 U.S. 677 (1900), at 700.

[13] See *Restatement*, at § 111, RN 3: '... the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts', See also Koh, 'Is International Law Really State Law?', 111 *Harv. L. Rev.* (1998) 1824; Stephens, 'The Law of Our Land: Customary International Law as Federal Law After Erie', 66 *Fordham L. Rev.* (1997) 393; Neuman, 'Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith', 66 *Fordham L. Rev.* (1997), at 371 *et seq.*; Henkin, 'International Law as Law in the United States', 82 *Mich. L. Rev.* (1984) 1555. For the view that customary international law is neither federal common law nor state law in the US legal system, but rather 'a *tertium quid* ... law to be applied in appropriate cases by federal courts in instances where they otherwise possess jurisdiction', see Aleinikoff, 'International Law, Sovereignty and American Constitutionalism: Reflections on the Customary International Law Debate', 98 *AJIL* (2004) 91.

[14] See *United States v Belmont*, 301 U.S. 324 (1937), in which Justice Sutherland held that 'the external powers of the United States are to be exercised without regard to state laws and policies ...' and that '... in respect of our foreign relations generally, state lines disappear...' (at 331).

[15] See in particular Bradley and Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position', 110 *Harv. L. Rev.* (1997) 815; *idem*, 'Federal Courts and the Incorporation of International Law', 111 *Harv. L. Rev.* (1998) 2260. With particular regard to human rights litigation, see by the same authors: 'The Current Illegitimacy of International Human Rights Litigation', 66 *Fordham L. Rev.* (1997) 319.

[16] See Trimble, 'A Revisionist View of Customary International Law', 33 *UCLA L. Rev.* (1986) 665.

[17] *Erie R. R. v Tompkins*, 304 U.S. 64 (1938).

in which the Supreme Court denied the existence of a federal common law.[18] While to many the considerations made by Justice Brandeis would not apply to customary international law,[19] some commentators, also relying on subsequent case law by lower courts,[20] have taken *Erie* to mean that the development of principles by federal courts could only occur if there were 'definite authority' behind it.[21] Narrowly interpreted, this process would only be valid for constitutional or legislative grants of authority. Interestingly enough, the Supreme Court in *Banco Nacional de Cuba v Sabbatino*,[22] indirectly confirmed that the interpretation of customary international law was a matter for the federal courts. Emphasizing that the question of attribution of powers between the judicary and the executive branch of government in matters bearing on the foreign relations of the United States could only be treated as 'an aspect of federal law', Justice Harlan concluded that 'rules of international law should not be left to divergent and perhaps parochial state interpretations'.[23]

'Revisionists' base their criticism of the 'modern view' — as codified in the *Restatement* — on a number of considerations, among which separation of power and federalism concerns on the one hand and democratic legitimacy on the other, stand out. In particular, the flexibility that the President needs to have in representing the United States internationally could be hampered by judicial enforcement of customary international law. The objection raises issues of deference of the judicial power to the executive branch of government, which will be dealt with later in this article.[24] It suffices here to note that the clearer and more solidly established the rules of customary international law are, the fewer the risks of a conflict between the judiciary and the executive. This point, clearly made by the Supreme Court in *Sabbatino* could well dispose of much of the expressed concerns.[25] Moreover, the administration of customary international law rules by federal courts would allegedly imply an illegitimate transfer of powers to the judicial power and the international community.[26] The argument seems to entail the existence and relevance of state powers in the field of foreign relations, which, however, the Supreme Court has long denied or

[18] *Ibid.*, at 78. It might be worth remembering that *Erie* reversed the earlier jurisprudence of the US Supreme Court, particularly *Swift v Tyson*, 41 U.S. (16 Pet.) 1 (1842), where it had been held that rules drawn from international *lex mercatoria* were part of the general common law to be adjudicated by federal courts sitting in diversity jurisdiction (at 8–12).

[19] See Jessup, 'The Doctrine of *Erie Railroad v Tompkins* Applied to International Law', 33 *AJIL* (1939) 740.

[20] See *Bergman v De Sieyes*, 170 F. 2d 360 (2d Cir. 1948). For criticism of this decision see L. Henkin, *Foreign Affairs and the United States Constitution* (2nd ed. 1996), at 410, n. 21 (interestingly, Professor Henkin was at the time law clerk to Judge Hand who wrote for the majority).

[21] *Erie R. R. v Tompkins, supra* note 18, at 79.

[22] *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398 (1964).

[23] *Ibid.*, at 425.

[24] See *infra* Section 5.

[25] *Banco Nacional de Cuba v Sabbatino, supra* note 22, at 428.

[26] See Bradley and Goldsmith, *supra* note 15, at 846.

downplayed.[27] Finally, the fact that '*unelected federal judges* apply customary law made by the *world community* at the expense of state prerogatives' would be conducive to disregarding the internal requirements of the political process and to neglecting states' interests in law-making.[28] The latter contention is quite revealing of the uneasiness with which the US currently relates to general international law. The 'shift away from consensualism to majoritarianism', or in other words from a strictly consent-based notion of general international law to multilateral law-making processes of a varying nature, which, incidentally, the international legal system seems to require more and more, departs from the fundamental tenets of the nationalist constitutional jurisprudence typified by some of the justices currently sitting in the Supreme Court.

Overall, the role played by customary international law remains negligible and, arguably, with the exception of the Alien Tort Claims Act (ATCA),[29] its impact on judicial decisions not particularly relevant. The recent doctrinal shift towards relegating customary international law into the margins of the legal system by denying its status as federal common law attests to the inward-looking attitude of the US legal system at this time and to its diffidence *vis-à-vis* external sources of law-making. Should courts sanction this scholarly attitude, the US legal system may become almost impermeable to that 'law of nations' which the framers and the early Justices considered as part of the law of the land and looked up to as the common legacy of civilization.[30]

3 The Endless Dispute on the Self-executing Character of International Law Norms: Legal Doctrine or Political Safety Valve?

The state of 'judicial confusion' and 'doctrinal disarray', in which the doctrine of self-execution seemed to be relegated not long ago,[31] seems worthy of a few remarks.

[27] See *United States v Curtiss-Wright Export Co.*, 299 U.S. 304 (1936) for the proposition that the foreign relations power had been vested directly in the federal government (at 318); *United States v Belmont*, 301 U.S. 324 (1937) underlying that 'in the foreign affairs realm, claims of states' rights carry little weight.' (at 331). The leading case of *Zschernig v Miller*, 389 U.S. 429 (1968), in which the Supreme Court clearly stated that the conduct of foreign relations is entrusted under the Constitution to the federal government, has been recently reaffirmed in *Am. Ins. Ass'n v Garamendi*, 123 S. Ct. 2373 (2003). That the treaty power should be subject to federalism constraints has been advocated by Bradley, 'The Treaty Power and American Federalism', 97 *Mich. L. Rev.* (1998) 390); *idem*, 'The Treaty Power and American Federalism. Part. II', 99 *Mich. L. Rev.* (2000) 98. *Contra* Golove, 'Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power', 98 *Mich. L. Rev.* (2000) 1075.

[28] Bradley and Goldsmith, *supra* note 15, at 868 (emphasis added). For criticism see Koh, 'International Law as Part of Our Law', 98 *AJIL* (2004) 43, at 55, noting that 'every court in the United States applies law that was not made by its own polity — including foreign law — whenever the court's own choice of law principles so direct.'

[29] See *infra* Section 10.

[30] See *Restatement*, at § 111, Introductory note.

[31] See Vázquez, 'The Four Doctrines of Self-Executing Treaties', 89 *AJIL* (1995) 695, at 695.

Few, if any topics, related to incorporation are more controversial than the doctrine of non-self-execution, which is the object of varying interpretations in different jurisdictions. Part of the confusion stems from the rather different concepts that the general idea of non-self-execution may allude to. As noticed by some commentators, at least in the United States, the doctrine may be seen as referring to a fairly wide range of hypotheses.[32] A treaty may be judicially unenforceable because the parties intended it to be so or because the type of obligation it lays down cannot be enforced directly by courts on separation of powers concerns. Moreover, a treaty may be unenforceable because treaty makers lacked the constitutional power to accomplish what the treaty provides for. Finally, a treaty may not create a right of action to the benefit of the claimants, who are then left without a remedy if they cannot rely on other legal bases. Other distinctions have been introduced in legal scholarship on the basis of theory and judicial practice, which also differentiate among varying notions underlying the doctrine of self-execution.[33] Be that as it may, US courts are reluctant to find multilateral treaties self-executing.[34] Either by giving effect to declarations and/or reservations attached by the Senate or the President, declaring multilateral treaties non-self-executing,[35] or interpreting autonomously the requirement of intent to establish self-execution, domestic courts in the United States do not seem willing to readily recognize the enforceability of treaty provisions.[36] This attitude has attracted criticism, as it risks depriving some agreements, particularly international human rights and humanitarian law treaties, of their intended effects.[37]

Outside the US context, two notions seem easily distinguishable. On the one hand, a treaty must be part of the law of the land; in other words, it must be valid municipal law for the courts to apply. On the other, its direct applicability depends on whether the content of the norm lends itself to be enforced by individuals by conferring them a right of action.[38] Indeed, the idea that treaties may create rights for individuals that are enforceable before domestic courts is much less troublesome to European courts, accustomed as they have become to the doctrine of 'direct effect' under community law.[39] As is known, the doctrine, elaborated in the early days of the European

[32] *Ibid.*, at 696–697.

[33] See Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Appraisal', 26 *Va. J. Int'l L.* (1986) 627.

[34] Quite curiously US courts tend to characterize extradition as well as Friendship, Commerce and Navigation (FCN) bilateral treaties as self-executing. See Bradley and Goldsmith, *supra* note 6, at 347 and *Restatement*, at § 111, RN 5. As regards relevant case law see *Asakura v City of Seattle*, 265 U.S. 332 (1924).

[35] See, for instance, U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, reproduced in 89 *AJIL* (1995) 111.

[36] For relevant practice see *Restatement*, at § 111, RN 5.

[37] For two recent examples in the above-mentioned areas see *Beazley v Johnson*, 242 F. 3d 248 (5th Cir. 2001) at 263 *et seq*, holding Article 6.5 of the ICCPR to be non-self-executing and *Hamdi v Rumsfeld*, 316 F. 3d 450 (4th Cir. 2003), at 468 holding Article 5 of the Third Geneva Convention on Prisoners of War to be non-self-executing.

[38] See Conforti, *supra* note 8, at 25 *et seq*.

[39] See the seminal case, Case 26/62, *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

integration process by the European Court of Justice, provides for the direct applicability of norms that are clear and unambiguous, unconditional and require no further legislative act to be applied by courts.[40] Although, of course, some distinctions are made depending on the type of normative acts in question, the basic understanding of the self-execution of international norms is that once the rule has been incorporated into the municipal legal order, its direct applicability is a matter of whether or not the rule by its content lends itself to be applied directly by the judge. While there may be instances in which such determination is clear, such as, when the treaty obligation clearly requires enabling legislation for the international rule to be implemented, the examination of such an issue greatly depends on the extent to which the judge is inclined to afford execution to the international rule. Even when the latter is not *per se* directly applicable, the judge could look at the whole of its legal system to see whether the content of the international rule could be complemented by other internal rules.[41]

The constitutional debate on self-executing treaties in the United States dates back to the 19th century and focuses principally on a decision rendered by the Supreme Court in 1829. In *Foster v Neilson,*[42] the Supreme Court distinguished the US Supremacy Clause from the British constitutional tradition,[43] whereby treaties can only be implemented and have effect within the municipal legal system by an act of Parliament, and held that a treaty '... is ... to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision'.[44] On that basis, the Court interpreted the bilateral treaty between Spain and the United States as requiring implementing legislation by Congress in order to be applied by courts to individuals. Little matter that the Court a few years later in *Percheman v United States*[45] interpreted the same provisions, construing the treaty differently on the basis of the Spanish version, as not requiring any future legislation by Congress to be enforced by courts. The distinction made by Justice Marshall in *Foster* between treaties which operate by themselves and treaties which do not has made its way into the constitutional debate on the basis of the above-mentioned passage in *Foster*. Justice Marshall had clearly identified the rule of decision in the intent of the parties to the treaty not to allow the treaty to be enforced directly by courts without further legislation. Even nowadays most US commentators as well as domestic courts would agree that whether or not a treaty is self-executing is a matter of intent. What is less clear is whose intent is relevant in determining the

[40] See generally T. C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (4th ed., 1998), at 187 *et seq*.

[41] See B. Condorelli, *Il giudice italiano e i trattati internazionali (gli accordi self-executing e non self-executing nell'ottica della giurisprudenza)* (1974), esp. at 55 *et seq*.

[42] 27 U.S. (2 Pet.) 253 (1829).

[43] As regards the implementation of treaties in the United Kingdom see Gardiner, *supra* note 5, at 144 *et seq*. Generally on foreign relations in the UK see Collins, 'Foreign Relations and the Judiciary', 51 *ICLQ* (2002) 485, and F. A. Mann, *Foreign Affairs in English Courts* (1986).

[44] 27 U.S. (2 Pet.) at 314.

[45] 32 U.S. (7 Pet.) 51 (1833).

question. Courts, in particular, are ambivalent as to whether it should be the parties' intent or rather the intent of the President of the United States or the US negotiators or of Congress that should be the determining factor.[46]

Recently, an attempt has been made to revise the doctrine of non-self-execution, primarily on the basis of historical arguments, to the effect of maintaining that 'courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing'.[47] The argument, besides its alleged historical underpinnings, is grounded on the 'deep structural imperatives' of the Constitution, particularly separation of power concerns.[48] This theory has been attacked on several grounds[49] and its ultimate impact on US practice is yet to be tested. What the theory stands for, however, can easily be accommodated within the framework of a nationalist jurisprudence which traces the debate on self-execution to the narrow boundaries of the constitutional interpretation discourse, disregarding almost entirely contemporary international policy considerations.

In sum, the doctrine of self-execution appears to be neither a political safety valve to eschew the effects of international obligations within the domestic sphere nor an internationally mandated legal doctrine which domestic courts ought to apply. It simply is a doctrine of US constitutional law, the interpretation of which is affected by arguments generally applicable to the US constitutional interpretation discourse. What may sound like a truism to an American public may be less so to all those international lawyers who look at the US legal system from the outside and may be tempted to misinterpret the debate on self-execution. Whatever the characterization of the doctrine, the current inclination to disfavour the direct applicability of treaty provisions by domestic courts as well as the policy to render multilateral treaties non-self-executing by reservation attest once again to the unwillingness of the United States legal system to open up to legal sources which do not find their basis in the domestic law-making process.[50]

[46] The *Restatement* takes the view that 'it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action' (§ 111, Comment h), which leaves unanswered whose intent represents the intention of the United States.

[47] See Yoo, 'Globalism and the Constitution: Treaties, Non-Self-Execution and the Original Understanding', 99 *Col. L. Rev.* (1999) 1955, at 1982.

[48] *Ibid.*

[49] For criticism of Yoo's theory see Vázquez, 'Laughing at Treaties', 99 *Colum. L. Rev.* (1999) 2154, and Flaherty, 'History Right? Historical Scholarship, Original Understanding, and the Supreme Law of the Land', 99 *Colum. L. Rev.* (1999), at 2095 *et seq.*

[50] Indeed the distinction between international treaty-making and domestic law-making appears to be crucial in Professor Yoo's analysis (see Yoo, *supra* note 47, at 2094) to discard the self-executing character of treaty obligations.

4 Regulating Conflict between Statutes and Treaties: A Few Remarks on the Last-in-time Rule

In principle, the proposition that in the event of conflict between a treaty of the United States and a federal statute the last-in-time rule would be applied is uncontroversial. According to the supremacy clause, both treaties and federal statutes are supreme and therefore take precedence over state law. The fact that the relationship between the two sources is regulated by a well-known principle such as the *lex posterior,* widely applied in solving conflicts among sources having the same formal rank, is not very surprising. A closer look at the operation of the principle in practice, however, casts some doubts on the alleged equality of treaties and federal statutes as well as on the alleged neutrality of the last-in-time principle.[51]

A first major limitation is that Congress has the power in any event, as a matter of domestic law and without prejudice to the international responsibility of the United States, which may ensue if an international obligation is breached as a result of such conduct, to override an earlier treaty provision.[52] Although there is a presumption that when legislating, Congress does not intend to repudiate the international obligations of the United States, a clear indication on its part that by enacting legislation it intended to supersede an earlier agreement or other international obligation would be generally dispositive for US courts. Surely courts, in principle, enjoy some margin of discretion, to the extent that they can interpret domestic law consistently with the international obligations of the forum state.[53] However, if it can be established that the intent of Congress is to supersede an earlier treaty provision, the statute takes precedence.[54] A further requirement for the last-in-time rule to operate is that the treaty provision must be self-executing, or, in the words of the *Restatement*, 'effective as law of the United States'.[55] Given the far-reaching effects of the doctrine of self-execution and the presumption against the self-executing character of treaties, this condition risks limiting even further the operation of the interpretative principle which gives priority to the *lex posterior*.

Despite this relatively uncontroversial understanding regarding the scope of the last-in-time rule, a closer look at the case law of US courts reveals that whereas the primacy of federal statutes over conflicting treaty provisions has been frequently upheld,[56] there is a paucity of case law that can be cited to support the argument that

[51] Generally, on the operation of the last-in-time rule in the United States see Vagts, 'The United States and Its Treaties: Observance and Breach', 95 *AJIL* (2001) 313.

[52] See *Restatement*, § 115(1)(b) and Comment b.

[53] See *infra* Section 8.

[54] It may be worth recalling that in *Diggs v Schultz*, 470 F. 2d 461 (D.C. Cir. 1972), the Court held that the 1971 Byrd Amendment (later repealed by Congress) had overridden SC Res. 232 of 1966, imposing sanctions against Southern Rhodesia. On this affair see H. Steiner, D. Vagts and H. H. Koh, *Transnational Legal Problems* (4th ed., 1994), at 538.

[55] See *Restatement,* at § 115(2).

[56] This is long established and firmly rooted in constitutional practice. For the early applications of the rule see *Chae Chan Ping v United States (Chinese Exclusion Case)*, 130 U.S. 581 (1899); *Edye v Robertson (Head Money Cases)*, 112 U.S. 580 (1884).

the opposite is also true. In fact, the often quoted case decided by the Supreme Court, which is supposed to have applied the principle, *Cook v United States*,[57] stands alone in upholding the precedence of treaty provisions over federal statutes on the basis of the last-in-time rule. The oddity of such a sparse application can be traced to a number of different reasons, ranging from the intent expressed by Congress to give priority to domestic law to the courts' way of construing the relation between domestic and international law in the instant case.

As is well known, the principle was invoked by the US Supreme Court in the *Breard v Greene* case, in which the Court held, *inter alia*, that the Antiterrorism and Effective Death Penalty Act of 1996 precluded the petitioner for habeas corpus to invoke a violation of the Vienna Convention on Consular Relations, which had not been pleaded in state court proceedings.[58] Most prominent among the international legal issues underlying the case stood the question of the relevance of the order on preliminary measures of the International Court of Justice (ICJ), whereby the ICJ unanimously requested the United States not to execute Breard pending the final decision on the merit of the case brought by Paraguay against the United States on the basis of the Vienna Convention on Consular Relations. The Secretary of State, underlying what she regarded as the non-binding language of the Court, wrote shortly afterwards to the Governor of Virginia reluctantly requesting that he stay the execution.[59] Emphasizing the 'substantial disagreement' on the binding nature of the ICJ's order, the Departments of State and Justice had submitted an amicus curiae brief to the Supreme Court, maintaining that the measures at the disposal of the United States to comply with the ICJ's order 'may in some cases include only persuasion' and that the ICJ's order did not 'provide an independent basis for [the Supreme] Court either to grant certiorari or to stay the execution'.[60]

In fact, the argument could have been made that the ICJ's order is a treaty-based self-executing provision and that as such it would trump conflicting statutes enacted at an earlier time. Some perplexities manifested by dissenting justices notwithstanding,[61] the Supreme Court gave little weight to the ICJ's order, astonishingly implying its legal irrelevance.[62] The Supreme Court's finding attracted criticism,[63] but some

[57] *Cook v United States*, 288 U.S. 102 (1933).

[58] *Breard v Greene*, 118 S. Ct. 1352 (1998).

[59] Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore, Governor of Virginia (Apr. 13, 1998).

[60] Brief for the United States as Amicus Curiae, *Breard v Greene*, 118 S. Ct. 1352 (1998) at 49–51.

[61] Justice Breyer, dissenting from the majority, would have liked to hear more argument 'on the potential relevance of proceedings in an international forum'(*ibid.*, at 1357).

[62] *Ibid.*, at 1356: 'It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it *on the basis of law*. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay.' (emphasis added).

[63] See, among others, Henkin, 'Provisional Measures, U.S. Treaty Obligations and the States', 92 *AJIL* (1998) 679; Vázquez, '*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures', 92 *AJIL* (1998), at 683.

segments of US international law scholarship welcomed its reminder that it is up to the political branches of government to strike a balance between the international and domestic interests of the United States and that the dualist character of the US Constitution is determinant in controlling the implementation of US obligations within its legal system.[64]

Overall the *Breard* case is an apt illustration of the way in which the current Supreme Court handles international law issues. The Court conveys in its reasoning the sense of how alien international law is to the domestic law discourse and does nothing to hide the fact that federalism concerns prevail over those of foreign relations. While it might be true that the instances in which the United States has breached its treaty obligations are 'not that great', if one takes into account the quantity of obligations incumbent on it, it is hard to deny that cases such as *Breard*, having 'ramifications that make them specially prominent', cast serious doubts on the willingness of the United States to abide by international law when its domestic law does not compel it to do so.[65]

5 The Relation of the Judiciary to the Executive Branch of Government in Times of Public Emergencies

The issue of what degree of deference is due from the judiciary to the executive branch of government has dramatically come to the fore in the aftermath of the September 11 terrorist attacks against New York and the Pentagon. As is known, shortly afterward the attacks a national emergency was declared by the President[66] and a joint resolution was passed by Congress on the 'Authorization for Use of Military Force',[67] which gave the President extensive powers to conduct the war on terrorism. In *Al-Odah v United States*, the Court denied habeas corpus relief to foreigners detained at the US military base in Guantanamo Bay, Cuba, which was found not to be under US sovereignty.[68] In so finding, the Court, while recognizing the ancillary character of the procedural right to habeas corpus with respect to the possession of substantive constitutional rights, held, on the basis of its prior decisions in *Johnson v Eisentrager*[69] and *Verdugo-Urquidez*,[70] that the latter are not available to aliens outside the United States. In *Hamdi v Rumsfeld*,[71] the 4th Circuit denied an American citizen habeas

[64] See Bradley and Goldsmith, 'The Abiding Relevance of Federalism to U.S. Foreign Relations', 92 *AJIL* (1998) 675; Bradley, 'The *Breard* Case. Our Dualist Constitution and the Internationalist Conception', 51 *Stanford L. Rev* (1999).

[65] See Vagts, 'The United States and Its Treaties: Observance and Breach', 95 *AJIL* (2001) 313, at 333–334.

[66] See Proclamation No. 7453, *Declaration of a National Emergency by Reason of Certain Terrorist Attacks*, 66 Fed. Reg. 48.199 (Sept. 14, 2001).

[67] Pub. L. No. 107–40, 115 Stat. 224 (2001).

[68] *Al Odah v United States*, 321 F 3d 1134 (D.C. Cir., 2003).

[69] 339 U.S. 763 (1950).

[70] *Verdugo-Urquidez v United States*, 494 U.S. 273 (1990).

[71] *Hamdi v Rumsfeld*, 316 F.3d 450 (4th Cir., 2003).

corpus relief, upholding the power of the President as Commander-in-Chief to detain individuals captured in the course of an armed conflict. The petitioner had no entitlement to challenge the factual assertions made by the executive that he was an enemy combatant captured in a zone of active combat abroad. Nor would further judicial inquiry be proper either to test the validity of such assertions or to exercise judicial review on the issue of whether or not hostilities had ended in the meantime, as the petitioner demanded. The Court held in passing that 'litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case.'[72] The petitioner's arguments, based on Article 5 of the Third Geneva Convention on prisoners of war, failed as the Court characterized the Convention as non-self-executing and not suitable for creating private rights of action enforceable before domestic courts.[73] In assessing its own role, it further found that '[t]he constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential attitude in reviewing exercises of this authority'.[74]

Far from being peculiar to the United States, a deferential attitude of courts towards the executive at times of national emergencies seems to be rather frequent in practice.[75] Although international human rights judicial and monitoring bodies have often underlined the importance of an independent and impartial judiciary as a fundamental guarantee for human rights in states of emergency,[76] formally independent and impartial tribunals in democratic states may be unduly constrained by separation of powers concerns when they are called upon to pass judgment on the sensitive area of national security, which by its very nature is a primary concern for the executive.[77] The above-mentioned case law and these considerations notwithstanding, two more recent decisions of the 9th and 2nd Circuits have suddenly reversed what could be considered a deferential attitude and openly challenged the conduct of the executive. In *Gherebi v Bush*,[78] the 9th Circuit upheld the jurisdiction of US federal courts on a Guantanamo detainee's habeas corpus petition, maintaining that the executive has no power to indefinitely detain foreigners in territory under the 'complete jurisdiction and control' of the United States. While acknowledging 'the unprecedented challenges that affect the United States' national security interests', the Court of Appeals held that particularly in times of national emergency 'it is the

[72] *Ibid.*, at 470.

[73] *Ibid.*, at 468.

[74] *Ibid.*, at 474.

[75] See Benvenisti, 'National Courts and the "War on Terrorism"', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (2004), at 307 *et seq*.

[76] See Bianchi, 'Enforcing International Law Norms against Terrorism: Achievements and Prospects', in Bianchi, *supra* note 75, esp. at 519 *et seq*.

[77] See, among others, *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*, UK Court of Appeal (Civil Decision), reproduced in 42 *ILM* (2003) 355: 'While the courts must carefully scrutinise the explanations given by the executive for its actions, the courts must extend the appropriate degree of deference when it comes to judging those actions.' (at para. 44).

[78] See *Gherebi v Bush*, No. 03–557855, 2003 U.S. App. Lexis 25625 (9th Cir. December 18, 2003).

obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike.'[79] The Court equally stressed the inconsistency of the US Government's position 'with fundamental tenets of American jurisprudence' and the 'serious concerns' that such conduct raise under international law.[80] The stance taken by the 9th Circuit is all the more significant if one realizes that the dissent had suggested abstaining from judgment 'until after the Supreme Court has decided the pending Guantanamo detainee case in which certiorari has been granted'.[81] The majority held instead that the Supreme Court, given the importance of the issue, would benefit from 'the dearth of considered opinions, and the conflict in views and reasoning' that result from the judgment.[82]

In *Padilla v Rumsfeld*,[83] the 2nd Circuit held that the President, in the absence of Congressional authorization, has no power, under Article II of the Constitution, to detain as an enemy combatant a US citizen arrested on American soil outside a zone of combat. Maintaining that neither the plain nor the 'clear and unmistakable' language of the joint resolution authorizes the President to detain American citizens captured on United States territory, the Court concluded that only Congress may have such power. Indeed, on the basis of the Non-Detention Act, which provides that '[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress',[84] the Court found Presidential powers to be at their lowest ebb, according to the well-known categorization of presidential war powers made by Justice Jackson in *Youngstown*.[85] Having ascertained that the President had acted in disregard of the will of Congress, the Court of Appeals directed the Secretary of Defence to release Padilla within 30 days.

The strain between such contrasting attitudes by the judiciary is in some ways the reflection of two strands of jurisprudence, one which conceives the role of the judiciary as an essential tool for protecting fundamental rights from the executive's interference and the other which is inclined to show more deference to the executive branch of government at times of national emergencies. The way the Constitution is interpreted depends largely on such varying attitudes. The grant of certiorari by the Supreme Court on two important points of law, namely whether the US has jurisdiction over its military base in Guantanamo, Cuba, as maintained by the defence teams of some of the terrorist suspects therein detained and on whether the executive has the power

[79] *Ibid.*, at 10.

[80] *Ibid.*

[81] *Ibid.*, at 66. On the grant of certiorari on the Guantanamo detainees case see *infra* note 86, and accompanying text.

[82] *Ibid.*, at 68.

[83] *Padilla v Rumsfeld*, Docket Nos. 03–2235 (L); 03–2438 (Con.), 2003 U.S. App. Lexis 25616 (2nd Cir., December 18, 2003).

[84] See 18 U.S.C.A. 4001(a) (2003).

[85] *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 578 (1952), at 644 (J. Jackson concurring): 'When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.'

under the Constitution to detain US citizens without an express authorization by Congress,[86] should help shed light on which attitude best conforms with the Constitution. Meanwhile, the executive has restated its conviction that judicial review by courts on issues related to the President's power as Commander-in-Chief must be deferential.[87]

6 Interpreting International Law: The Vienna Convention and Beyond

The way in which international law is interpreted by US courts varies and it is thus difficult to generalize. Moreover, the panoply of theories which have been developed in the context of constitutional and statutory as well as contracts interpretation has strongly affected US courts' interpretive attitudes. However, some decisions handed down by the Supreme Court in the 1990s attest well to the unwillingness on the part of the US to pay due heed to internationally accepted canons of interpretation. This holds true particularly for the Vienna Convention on the Law of Treaties. Although it is not a party to it, the United States has indicated that the Convention 'is already generally recognized as the authoritative guide to current treaty law and practice'.[88] The fact that the Vienna Convention rules on treaty interpretation are declaratory of customary international law has been affirmed several times by the ICJ and does not seem controversial.[89] Nonetheless, the Supreme Court blatantly disregarded the Vienna Convention and proceeded to interpret treaty law by departing remarkably from its canons. It has been observed that 'the record of the United States Supreme Court reveals a tendency in fact to favour maintenance of US interests and legal structure over plain meaning'.[90] A cursory analysis of the relevant case law seems to support this finding.

In *United States v Alvarez Machain*, the Supreme Court held that the bilateral treaty of extradition between Mexico and the United States could not be interpreted as prohibiting kidnapping, since no express provisions concerning an obligation to refrain from forcible abduction appeared in the text.[91] Heavily relying on the *travaux préparatoires*, the Court denied that such prohibition could be inferred from the treaty and concluded that even if the abduction manifested a violation of general principles

[86] See *Al Odah v United States, cert. granted* on November 10, 2003 (124 S. Ct. 534; 157 L. Ed. 2d 407) and *Rumsfeld v Padilla, cert. granted* on Feb. 20. 2004 (157 L. Ed. 2d 1226).

[87] See *Remarks by Alberto R. Gonzales, Counsel to the President, before the American Bar Association Standing Committee on Law and National Security*, Washington, D.C., 24 February 2004, available at http://www.abanet.org/natsecurity/judge-gonzales.pdf, last visited 10 March 2004.

[88] See S. Exec. Doc. L., 92d Cong., 1st Sess. (1971), at 1. Also the *Restatement* 'accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements' (Pt. III. International Agreements. Introductory Note).

[89] See *Territorial Dispute (Lybia v Chad)* Judgment, ICJ Reports (1994), para. 41; *Oil Platforms (Iran v US)*, Preliminary Objections, Judgment, ICJ Reports (1996), para. 23; *Kasikili/Sedudu Islands (Botswana v Namibia)*, Judgment, ICJ Reports (1999), para. 18.

[90] Vagts, 'Treaty Interpretation and the New American Ways of Law Reading', 4 *EJIL* (1993) 472, at 508.

[91] *Alvarez Machain v United States*, 504 U.S. 655 (1992), at 663–664.

of international law this was immaterial for the purpose of establishing a violation of the bilateral treaty of extradition.[92] All the more so, given that the practice quoted by the respondent in support of the claim that abduction is prohibited under international law was not related to extradition treaties.[93] Having acknowledged that 'the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch',[94] the Court applied the *Ker* doctrine upholding the exercise of jurisdiction by US courts over the respondent.[95] In his dissenting opinion, Justice Stevens distinguished the *Ker* rule as referring to an abduction carried out by private citizens. The fact that in the case at hand the abduction was expressly authorized by the Executive represented in his view 'a flagrant violation of international law' as well as a breach of the treaty obligations of the United States.[96] The Court's '"shocking" disdain for customary and conventional international law principles ... entirely unsupported by case law and commentary' was characterized as a '"monstrous" decision' affecting 'every nation that has an interest in preserving the Rule of Law'.[97] In construing the treaty, neither the Supreme Court's majority nor the dissenting Justices made any reference to the Vienna Convention rules on treaty interpretation, a particularly striking omission given that two of the most pressing issues with which the Court was confronted, namely the relevance of customary international law to treaty interpretation as well as the deference to be accorded to 'extra-textual materials', are clearly addressed by the Vienna Convention.[98]

Similar considerations apply to the *Sale v Haitian Center Council Inc.* case, decided by the same Supreme Court in 1993.[99] In *Sale* the Court upheld the Executive policy of intercepting Haitians on the high seas bound for the United States to seek asylum and returning them to Haiti where they risked being persecuted. In construing the relevant provisions of domestic law, particularly section 243(h)(1) of the INA, the Court denied that the act could have extra-territorial effects and be applied to aliens on the high seas. With regard to Article 33 of the 1951 Refugee Convention, the Court equally held that no extra-territorial effect could be recognized in the provision and, relying on the *travaux préparatoires*, concluded that the principle of *non-refoulement* only applied to aliens physically present in the territory of the contracting parties.[100] The sole dissenting opinion, appended by Justice Blackmun, underlined that the majority had ignored the rule of treaty interpretation codified in Article 31 of the

[92] *Ibid.*, at 669.

[93] *Ibid.*, at 667.

[94] *Ibid.*, at 669.

[95] *Ker v Illinois*, 119 U.S. 436, 30 L. Ed. 421, 7 S. Ct. 225 (1886), holding that the irregular manner in which a defendant comes before the court does not affect the court's jurisdiction.

[96] *Ibid.*, at 682.

[97] *Ibid.*, at 686–687.

[98] See Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation', 44 *Va. J. Int'l L.* (2004) 431, at 433.

[99] *Sale v Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993). See case-note by David Jones in *AJIL* (1994) 114.

[100] *Ibid.*, at 2567.

Vienna Convention on the Law of Treaties by giving priority to the *travaux préparatoires*, which are instead relegated to a subsidiary role by Article 32 of the same Vienna Convention.

Although not directly related to the issue of treaty interpretation, the decision rendered by the Supreme Court in 1993 in the *Hartford Fire Insurance Co.* case also merits some remarks.[101] The complex litigation underlying the case concerned, *inter alia*, the extra-territorial application of the Sherman Act to the conduct of some London-based reinsurers who had allegedly conspired to force primary insurers to change the terms of their commercial general liability policies. On this particular issue, Justice Souter, speaking for a minimal five-to-four majority, held that the Sherman Act was applicable to foreign conduct having substantial effects in the United States[102] and that, there being no conflict between domestic and foreign law, 'international comity would not counsel against exercising jurisdiction'.[103] Interestingly enough, in a fairly odd reversal of his traditional perspective, Justice Scalia appended a dissenting opinion in which he heavily criticized the majority for having discarded international law considerations, identified with the codification of the international law of jurisdiction made by the *Restatement*. In particular, having applied to the facts of the case the factors relevant to establish the reasonableness of a jurisdictional claim, he concluded that '[r]arely would these factors point more clearly against application of United States law.'[104] Much of the ensuing debate in the United States focused on the extent to which the Supreme Court had correctly interpreted and/or disavowed the *Restatement*.[105] Few advocated the need for the Supreme Court to construe such concepts as conflict of jurisdiction, extra-territoriality and comity in light of international law parameters.

The controversy in *Hartford Fire* concerning how to interpret the *Restatement* paves the way for a final comment. Indeed, the *Restatement* is sometimes the only source from which courts, particularly lower courts, draw when called upon to decide international law issues. The scant familiarity with international law materials (surely not peculiar to the US judiciary only!) is frequently a reason for courts to rely on the codification set up by the American Law Institute. However authoritative, the *Restatement* is a secondary source, which at most can provide guidance on international law matters. The risk of using it as the sole or most important authority for determining points of international law is all the more evident when the approach taken by the *Restatement* remarkably departs from generally accepted standards, as is

[101] *Hartford Fire Insurance Co. v California*, 113 S. Ct. 2891 (1993). For a comment see Lowenfeld, 'Jurisdictional Issues before National Courrts: The *Insurance Antitrust Case*', in K. M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (1996), at 1 *et seq*.

[102] See Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (1988).

[103] *Hartford Fire Insurance Co. v California*, *supra* note 101, at 2910.

[104] *Ibid.*, at 2921.

[105] See Lowenfeld, 'Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the *Insurance Antitrust Case*', 89 *AJIL* (1995) 42; Trimble, 'The Supreme Court and the Demise of *Restatement* Section 403', *ibid.*, at 53.

the case with the section on the international law of jurisdiction.[106] Interestingly enough, in its recent decision in *United States v Yousef*,[107] the 2nd Circuit reversed the finding of the district court that had upheld the exercise of jurisdiction by the United States over a foreign terrorist suspect on the basis of the universality principle under international customary law, precisely on the grounds that the sole authority relied upon by the district court was the *Restatement*.[108]

7 The Relevance of International Obligations: External Delegation of Powers and Its Limits

On 31 March 2004, the ICJ delivered its judgment on the case *Concerning Avena and Other Mexican Nationals*.[109] After finding the United States at fault again for non-compliance with Article 36 of the Vienna Convention on Consular Relations, the Court reiterated the need for the United States to provide reparation in the form of 'review and reconsideration' of convictions and sentences of the Mexican nationals. The Court cautiously held that there was no evidence to establish a 'regular and continuing' pattern of breaches of Article 36 of the Vienna Convention on the part of the United States.[110] However, mindful that the Mexican citizens involved in the judgment are but one national group of foreign nationals finding themselves in similar situations in the United States, the Court specified that its ruling would also be applicable to them.[111]

Indeed, the *Avena* case is in many ways a follow-up to the decision taken by the ICJ in the *LaGrand* case,[112] where the Court had held that the United States 'by means of its own choosing'[113] had to allow review and reconsideration of the conviction and sentence, to be carried out 'by taking account of the violation of the rights set forth in the Convention'.[114] In *Avena*, the ICJ aptly distinguished 'due process rights under United States constitutional law' on the one hand and 'Vienna Convention . . . treaty rights which the United States has undertaken to comply with in relation to the individual concerned' on the other.[115] Acknowledging that the procedural default rule

[106] See, in particular, § 403, Comment a, holding that the principle of reasonableness as a principle of international law. For criticism see Bianchi, 'Jurisdictional Rules in Customary International Law: A Comment', in Meessen, *supra* note 101, at 74 *et seq*., esp. 85 *et seq*.

[107] *United States v Yousef*, 327 F. 3d 56 (2d Cir. 2003).

[108] *Ibid.*, at 69: 'The Restatement (Third), a kind of treatise or commentary is not a *primary* source of authority upon which, standing alone, courts may rely for propositions of customary international law' (emphasis in the original).

[109] *Case Concerning Avena and Other Mexican Nationals* (Mexico v United States of America), judgment of 31 March 2004.

[110] *Ibid.*, at para. 149.

[111] *Ibid.*, at 151.

[112] *LaGrand (Germany v United States)*, ICJ Reports (2001), judgment of 27 June 2001.

[113] *Ibid.*, at 516, para. 128.

[114] *Ibid.*, at 514, para. 125.

[115] *Case Concerning Avena and Other Mexican Nationals*, *supra* note 109, at para. 139.

as currently applied bars defendants from raising the issue of the violation of the Vienna Convention and confines them 'to seeking the vindication of [their] rights under the United States Constitution',[116] the Court emphasized that the review and reconsideration prescribed in *LaGrand* should be effective.[117] In principle such review and reconsideration 'should occur within the overall judicial proceedings related to the individual defendant concerned'[118] and not within the clemency process as advocated by the United States.[119]

On the domestic side of the litigation, it is worth noting that the US Supreme Court had denied certiorari in *Torres v Mullin* in December 2003. Justice Breyer, in a fairly sharp dissent, took the view that individual petitioners' and Mexico's arguments were 'substantial' and that '[g]iven the international implications of the issues raised ... further information, analysis and consideration are necessary', particularly in light of what the ICJ would say on the *Mexico v United States* case.[120] Breyer's preference for deferral of consideration of the petition was grounded on the serious weight that should have been given to the arguments raised by Torres as well as Mexico. In particular, the fact that the United States is a party to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes makes the ICJ's interpretive ruling in *LaGrand* binding on the United States. Therefore the ICJ's finding that the Convention creates individual rights, which are self-executing in the United States and supreme over state law, should entitle petitioners to an appropriate remedy, 'state law procedural bars or lack of prejudice notwithstanding'.[121] Moreover, the ICJ had made clear that the procedural default rule 'in its specific application in the present case'[122] violated the Convention and that the rules and procedures of the United States 'must enable full effect to be given to the purposes for which the rights accorded' by Article 36.2 of the Vienna Convention 'are intended',[123] the consideration of whether or not an individual would have requested consular assistance being immaterial.[124] Incidentally, Justice Stevens, while concurring in the denial of certiorari, also conceded that the Supreme Court is 'unfaithful' to the Supremacy Clause when 'it permits to state courts to disregard the Nation's treaty obligations'.[125]

Indeed, the argument that by delegating the power to an international institution,

[116] *Ibid.*, at para. 134.

[117] *Ibid.*, at para. 138.

[118] *Ibid.*, at para. 141.

[119] The Court specified that, although in principle they do not meet the requirement of effectiveness required by the *LaGrand* judgment, 'appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention.' (para. 143).

[120] *Torres v Mullin, cert. denied.*, 157 L. Ed. 2d 425 (2003) (Breyer, J., dissenting). For comment see Macina, 'Avena and Other Mexican Nationals: The Litmus for LaGrand and the Future of Consular Rights in the United States', 34 *Cal. W. Int'l L.J.* (2003) 115.

[121] *Ibid.*

[122] *LaGrand, supra* note 112, at para. 90.

[123] Art. 36.2 of the Vienna Convention, cited in para. 88 of the ICJ's ruling in *LaGrand*.

[124] *LaGrand, supra* note 112, at para. 74.

[125] *Ibid.*

namely the ICJ, to interpret the rules of a treaty of the United States, the latter has committed itself to complying with its rulings carries much force. In the words of Justice Breyer, '[t]he answer to Lord Ellenborough's famous rhetorical question, "Can the Island of Tobago pass a law to bind the rights of the whole world?" may well be yes, where the world has conferred such authority through treaty.'[126] The fact that external delegation of authority may encroach on the internal allocation of powers has caused some scholars either to reject its admissibility altogether on constitutional grounds,[127] or to advocate recourse to interpretative means, such as a presumption of non-self-execution in the United States of decisions and actions taken by international institutions, to cope with delegation concerns.[128] It is hard not to concede that 'US courts have intuitively followed this approach, and the political branches have increasingly incorporated it into treaties and statutes'.[129] These suggestions attest to the unwillingness of both the federal government and a certain strand of US scholarship to allow the legal system to open up to international law, even when a sound argument can be made that the international obligations of the United States adopted in conformity with the Constitution mandate such consideration. Again, once the effects of international obligations are perceived as intersecting with the internal equilibrium of the constitutional legal order, and separation of powers or federalism concerns are raised, they are almost invariably, although not always persuasively, dismissed by the judiciary.

8 The *Charming Betsy* Canon of Statutory Construction: A Sinking Vessel?

Quite obviously another way of giving effect to international law is by means of interpretation of domestic law. Indeed, this is a technique that is widely used across jurisdictions to ensure that, regardless of formal considerations concerning the rank of different sources of law within the legal system, international law standards are taken into account. Different methods of interpretation can achieve this result, the presumption of consistency of domestic law with international law standing out as one of the most effective. The rule of statutory construction, whereby courts should interpret as much as possible their domestic law in conformity with the international obligations of the forum state, is known in several jurisdictions, belonging to different legal traditions, although its scope of application as well as the conditions triggering its applicability may vary from state to state. In the United States the rule is known as *The Charming Betsy* rule of statutory construction and was named after a case decided

[126] *Torres v Mullin, cert. denied.*, 157 L. Ed. 2d 425 (2003) (Breyer, J., dissenting).

[127] See, among others, Ku, 'The Delegation of Federal Power to International Organizations: New Problems with Old Solutions', 85 *Minn. L. Rev.* (2000) 71; Yoo, 'Kosovo, War Powers and the Multilateral Future', 148 *U. Pa. L. Rev.* (2000) 1673; *idem*, 'New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause', 15 *Const. Comment.* (1998) 87.

[128] See Bradley, 'International Delegations, the Structural Constitution, and Non-Self-Execution', 55 *Stan. L. Rev.* (2003) 1557.

[129] *Ibid.*, at 1596.

by the Supreme Court in 1804.[130] The same Supreme Court had previously formulated the rule in *Talbot*, but oddly enough it made no reference to it in its 1804 decision.[131] In construing the Nonintercourse Act of 1800 in conformity with the international law of neutrality, the Court held that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'.[132] This canon of statutory interpretation was codified in the 1987 *Restatement*, which devoted to it an autonomous section.[133] Although its formulation was slightly altered to read, '[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an agreement of the United States', its formulation remains fairly broad in scope. Although the interpretive canon is of no avail if an act of Congress purposely supersedes a pre-existing rule of international law, be it customary or treaty-based,[134] its potential is not negligible if one wants to foster the internalization of international law rules and their underlying values.

Despite some scholarly attention being paid to it, one is struck by the relatively sparse application of this canon by courts, particularly in cases in which its use would seem proper. When describing the operation of the rule, reference is usually made to the *Palestinian Liberation Organization* case,[135] where Judge Palmieri construed the Antiterrorism Act of 1986 in conformity with the Headquarters of the United Nations Agreement. By expressly quoting the *Charming Betsy* canon, he noticed that nothing in the legislative history of the Act suggested that the Congress had expressly intended that the prohibition 'to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States'[136] applied to the PLO Permanent Observer Mission to the United Nations. Although the government had insisted on the application of the later-in-time rule and had underlined that in all likelihood Congress wanted to sweep away any inconsistent international obligation, the Court held that Congress had failed 'to provide unequivocal interpretive guidance' and that the ATA had to be considered as a 'law of general application ... without encroaching on the position of the [PLO] Mission at the United Nations'.[137]

Admittedly, its application to the *PLO* case stretches the limits of the *Charming Betsy* canon to its outer border. Particularly, the clause of the Antiterrorism Act that mandated its application 'notwithstanding any provision of law to the contrary' casts a shadow on the propriety of the interpretive exercise undertaken by Judge Palmieri. Be that as it may, what is stunning is not that the rule has been occasionally applied

[130] See *Murray v The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

[131] See *Talbot v Seeman*, 5 U.S. (1 Cranch) 1 (1801): 'the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations' (at 43).

[132] See *Murray v The Schooner Charming Betsy*, *supra* note 130, at 118.

[133] See *Restatement*, at § 114.

[134] *Ibid.*, RN 1.

[135] See *United States v Palestinian Liberation Organization*, 695 F. Supp. 1456 (SDNY 1988).

[136] See Antiterrorism Act of 1986, 22 U.S.C. § 5202 (3).

[137] *United States v Palestinian Liberation Organization*, *supra* note 135.

broadly, but, rather, that it has not been used at all when its use would have been most obvious. For example, courts have invariably refused to resort to the canon with regard to the interpretation of the Foreign Sovereign Immunities Act. Despite earlier attempts to resort to the canon by courts,[138] the US Supreme Court[139] and lower courts alike[140] have subsequently refused to make an effort to interpret the FSIA consistently with international law standards.[141] The omission is all the more striking, if one considers that the FSIA was expressly enacted by Congress with a view to implementing international law standards into the US legal system, thereby removing from the executive branch of government the power to affect judicial determination in foreign sovereign immunity matters.[142]

A fair conclusion would then be that, although the *Charming Betsy* rule of statutory construction provides the judge with a powerful and fairly open-ended interpretive tool to implement international law within the forum state, US courts have only partly exploited this potential and most of the time refrain from construing domestic law consistently with international legal parameters. The perception that the US judiciary is little inclined to take international law into account for the purposes of interpreting statutes becomes even more evident if one considers constitutional interpretation.

9 Foreign Fads and the Interpretation of the Constitution

At a time of ever increasing comparative constitutional analysis dialogue,[143] the US Supreme Court majority's resolve not to consider foreign as well as international materials seemed until recently almost unfaltering. In 2002, Justice Thomas, concurring in denying certiorari in the *Foster v Florida*, case concerning an Eighth Amendment challenge to the death row phenomenon, heavily criticized his brother Breyer for having referred to the concern expressed by the Supreme Court of Canada over delays in the administration of the death penalty in the United States. After stating that Congress when legislating may take into consideration the actions of other nations, should it so wish, he added that 'this court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.'[144]

[138] See *Von Dardel v Union of Soviet Socialist Republics*, 623 F Supp 246 (DDC 1985).

[139] See *Argentine Republic v Amerada Hess Shipping Co.*, 488 U.S. 428 (1989) and *Saudi Arabia, King Faisal Specialist Hospital and Royspec v Nelson et Ux.*, 113 S Ct 1471 (1993).

[140] See, among others, *Princz v Federal Republic of Germany*, 26 F 3d 1166 (DC Cir. 1994); *Smith v Socialist People's Libyan Arab Jamahiriya*, 101 F 3d 239 (2nd Cir. 1996) and *Sampson v Federal Republic of Germany*, 250 F 3d 1145 (7th Cir. 2001).

[141] See Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian J. Publ. Intl. L.* (1994) 195, at 211 *et seq.*

[142] See House of Representatives Report No. 1487, 94th Congress, 2nd Sess., at 7. See also the Letter sent by the Legal Adviser to the State Department, M. Leigh, to the Attorney General, E. H. Levi, on 2 November, 1976, reproduced in *United Nations Legislative Series. Materials on Jurisdictional Immunities of States and their Property* (1982), at 126 *et seq.*

[143] See Jackson, 'Comparative Constitutional Federalism and Transnational Judicial Discourse', 2 *Int'l J. Constitutional L.* (2004) 91; Moon, 'Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?', 12 *Was. U. J. L. & Pol'y* (2003) 229.

[144] *Foster v Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari).

This sharp statement epitomizes the attitude of the strenuous defenders of the so-called 'nationalist jurisprudence' in the Supreme Court. This jurisprudence focuses strictly on the American legal system for the determination of constitutional issues. Rarely, if ever, does it undertake comparative constitutional analysis or look at international and foreign law materials. It refuses constraints on national powers deriving from international law, showing in this respect a certain deference to the executive branch of government. Attempts to foster actual consideration of legal issues as they are treated in other legal systems have been defeated,[145] and episodic instances of interpretation of the Constitution in the light of international legal standards[146] have been almost immediately confuted.[147]

Two decisions rendered recently by the Supreme Court have been hailed by some commentators as signalling 'that the nationalists' heyday has finally passed.'[148] Three paragraphs of the judgment in *Lawrence v Texas*[149] and a footnote in *Atkins v Virginia*[150] would account for such a dramatic shift. The latter was a case concerning an Eighth Amendment challenge to the execution of mentally retarded criminals. Several *amicus curiae* briefs were laid before the Court, drafted by different actors in an attempt to draw the Court's attention to the almost universal condemnation of capital punishment being inflicted on mentally handicapped persons. The Court did not pay much attention to the materials presented to it, but it acknowledged in a footnote that '... within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved'.[151] In *Lawrence* the Court had to determine whether a Texan law making homosexual sodomy a criminal offence violated the due process provisions of the Constitution. Taking note of an amicus curiae brief submitted by Mary Robinson and others, and mentioning the case law of the European Court of Human Rights, particularly the *Dudgeon v UK* case of 1981,[152] the Court reversed its decision in *Bowers v Hardwick*.[153] The Texan law was thus held to be unconstitutional, on the grounds that it furthered no legitimate state interest which could justify the state's intrusion into the private life

[145] See for instance the dissenting opinion of Justice Breyer in *Printz v United States*, 521 U.S. 898 (1997), emphasizing that the experience of other countries on the same legal problems could 'cast an empirical light' on like issues of constitutional interpretation (at 921, n. 11, 977).

[146] See *Thompson v Oklahoma*, 487 U.S. 815 (1988), where Justice Steven's majority opinion held that the death penalty inflicted on 15-year-old criminals violated the Eighth Amendment's 'civilized standards of decency' citing, *inter alia*, international treaty instruments prohibiting the execution of juveniles.

[147] See *Stanford v Kentucky*, 492 U.S. 361 (1989), where the Court *per* Scalia, after dismissing any review of other countries' practices by holding that 'it is American conceptions of decency that are dispositive' (at 369 n. 1), upheld the constitutionality of the death penalty inflicted on 16-year-old offenders.

[148] Koh, *supra* note 28, at 56.

[149] *Lawrence v Texas*, 123 S. Ct. 2472 (2003).

[150] *Atkins v Virginia*, 536 U.S. 304 (2002).

[151] *Ibid.*, at 316 n. 21, quoting the European Union Brief.

[152] 45 Eur. Ct. H.R. (ser. A) (1981).

[153] *Bowers v Hardwick*, 478 U.S. 186 (1986).

of the individual. Petitioners were held to enjoy, under the Due Process Clause, the full right to engage in their conduct without the interference of the government.[154]

If the reference to the jurisprudence of the European Court appears to have had the limited role of undermining the premises on which *Bowers* had been decided, namely that the criminalization of homosexual sodomy relied on values shared with a wider civilization,[155] it undoubtedly represents a departure from a strictly nationalist approach. The dissent underscored the inappropriate character of such a method of constitutional interpretation and restated the irrelevance of the 'viewpoints of other countries'.[156] There appears to be no sensitivity among the dissenting judges to any method of constitutional interpretation that is not exclusively rooted in the US legal system. Treatment of international law issues and comparative constitutional analysis under the heading of 'foreign views', to be relegated into the category of 'meaningless dicta',[157] is an apt illustration of this interpretive methodology.

Discussions on whether the Supreme Court should take into account international and foreign law materials have taken on the contours of any debate concerning constitutional interpretation. The two strands of American jurisprudence, both the nationalist and the internationalist, within and outside the court, raise different arguments to support their views and undermine those of their adversaries. A recurrent argument among those who advocate that the use of international sources would be inappropriate for the interpretation of the US Constitution is that to attribute constitutional relevance to international values would run counter to the fundamental tenet that only American standards can be dispositive in the interpretation of the Constitution. Doing otherwise would be tantamount to imposing, via the interpretive activity of judges, an externally-formed countermajoritarian will on the American societal body to the detriment of domestic democratic accountability mechanisms.[158] The argument is closely shaped by the well-known 'countermajoritarian difficulty', which in the domestic context alludes to the concern that by holding unconstitutional an act of the legislature or the executive, the Supreme Court may thwart the democratically expressed will of the majority.[159] The correct framing of this issue in US constitutional terms helps us understand better the charge, voiced by some

[154] For comment see Alford, 'Misusing International Sources to Interpret the Constitution', 98 *AJIL* (2004) 57; Ramsey, 'International Materials and Domestic Reflection on *Atkins* and *Lawrence*', 98 *AJIL* (2004), at 69 *et seq.*; Neuman, 'The Use of International Law in Constitutional Interpretation', 98 *AJIL* (2004), at 82 *et seq.*

[155] *Ibid.*, esp. at 196.

[156] See *Atkins v Virginia*, *supra* note 150, at 325 (Rehnquist, C.J., dissenting).

[157] See *Lawrence v Texas*, *supra* note 149, at 2494 (Scalia, J., dissenting).

[158] See Alford, 'Misusing International Sources to Interpret the Constitution', 98 *AJIL* (2004) 57. In highlighting the peculiarities of what he calls the 'international countermajoritarian difficulty', Alford notes that '... the international countermajoritarian difficulty also suffers a burden unique to the international context: to the extent that constitutional guarantees *are* responsive to democratic popular will, those guarantees are not to be interpreted to give expression to international majoritarian values to protect the individual from democratic governance.' (at 56, emphasis in the original).

[159] For an overview see Friedman, 'The History of the Countermajoritarian Difficulty, Part One: the Road to Judicial Supremacy', 73 *NYU L. Rev.* (1998) 333.

constitutional lawyers,[160] that international law may be a threat to democracy, and rejected by fellow international lawyers with a sense of outrage and deep concern about the current attitude of the legal profession in the United States.[161] At the opposite side of the spectrum lies the position of those who, along the lines of a long-established but almost forgotten tradition of consideration of international law in the constitutional interpretation debate, would favour an increasing use of foreign and international law sources. In particular, for the construction of concepts and principles also known in other legal systems, 'decent respect' should be paid to international law and to the experience of other countries.[162] Whereas its opening towards international sources should not be overemphasized,[163] this segment of US jurisprudence stands in sharp contrast with traditional nationalist jurisprudence. Some extant perplexities about how to construe a coherent and consistent system of interpretation notwithstanding,[164] its potential for rendering the US legal system more sensitive to non-national legal sources remains intact.

It is premature to speculate whether *Atkins* and *Lawrence* have inaugurated a new course, letting international and foreign legal standards penetrate a bit more deeply into the otherwise rather impermeable texture of American constitutional interpretation. The upcoming decision on *Roper v Simmons*, may well provide the Court with the occasion to shed light on this point.[165] To the outside, however, the two decisions of the Supreme Court do not denote any particular inclination to take into account international law standards. In *Lawrence* no mention was made of Article 17 of the ICCPR, which, incidentally, the US ratified with no particular reservation being attached to this very norm. Nor can any reference to international law standards on infliction of the death penalty to the mentally retarded be traced in *Atkins*. Overall, the impression of the external observer is that the relevance to constitutional interpretation of this debate bearing on the use of international materials, unselectively referred to as 'foreign', is limited. The fact that the mere mention of legal materials which do not originate directly from it may stir up such a heated debate attests to the still predominantly inward-looking character of the US legal system.

[160] Rubenfeld, 'The Two World Orders', 27 *The Wilson Quarterly* (2003), at 22–36.

[161] Slaughter, 'A Rallying Cry', *ASIL Newsletter*, Nov.-Dec. 2003, at 1 and 6.

[162] See Koh, 'Paying Decent Respect to International Tribunal Rulings', 96 *ASIL Proc.* (2002) 45, and *idem*, *supra* note 28, at 56.

[163] *Ibid.*: '... transnationalists suggest that particular provisions of our Constitution should be construed with decent respect for international and comparative law'.

[164] See Ramsey, *supra* note 154.

[165] See *Roper v Simmons*, *cert. granted* on 26 Jan. 2004 (124 S. Ct. 1171 (2004)). The Supreme Court granted certiorari after the Missouri Supreme Court found that the execution of juvenile offenders violates the Eighth and Fourteenth Amendment of the Constitution (see *State ex rel. Simmons v Roper*, 112 S.W. 3d 397 (2003)).

10 The Anomaly of Human Rights Litigation before Civil Courts: The ATCA and Its Destiny

In many ways, given the general lack of inclination shown by US courts to pay due heed to international legal issues, litigation under the Alien Tort Claims Act is somewhat an anomaly.[166] As is well known, the ATCA permits aliens to bring a civil suit before US federal courts 'for a tort only, committed in violation of the law of nations'. Starting from the seminal case of *Filartiga v Peña Irala*,[167] US courts have extensively resorted to it in order to provide redress to foreign victims of human rights abuses. Given its rather open-ended wording, the statute has been applied against state and non-state actors reaching out to foreign states and their officials as well as to corporate entities.[168] In *Filartiga*, the Court, using a somewhat unusual interpretive canon, held that reference to international law had to be interpreted as the law stands today and not as it was in 1789 at the time of enactment.[169] US courts have found a considerable number of offences to be amenable within the scope of the Act, including torture, disappearances, forced labour, arbitrary arrest and detention and extra-judicial killings.[170] The ATCA was complemented in 1992 by the enactment of the Torture Victim Protection Act (TVPA),[171] which extends also to US citizens the right to bring a civil action against individuals responsible for having committed acts of torture or summary executions under colour of authority of any foreign nation. In many ways, the US legislation has introduced some sort of universal jurisdiction in civil cases, thus complementing the principle of universality of jurisdiction in criminal law. Numerous have been the cases litigated under the ATCA and remedies in the form of damage awards have been granted to victims of human rights violations and/or their relatives. In fact, litigation under the ATCA and the TVPA has come under attack also on the grounds that damage awards, some of which are substantial, have been almost invariably impossible to collect.[172] The symbolic value of a declaratory judgment ascertaining the responsibility of the defendant has been nonetheless valuable for victims and their relatives in order to have some form of redress, regardless of the collection of the damage awards.[173]

Despite its shortcomings, the overall impact of human rights litigation under the ATCA has been significant for the development of human rights litigation before municipal courts generally. The possibility of suing the perpetrators of human rights abuses either in criminal or civil proceedings has spurred further litigation, and courts, by disposing of such judicially-made doctrines of abstention as the act of state

[166] Alien Tort Claims Act, codified at 28 U.S.C.A. 1350 (2000).

[167] *Filartiga v Peña Irala*, 630 F. 2d 876 (2d Cir., 1980)

[168] See, among others, *Wiwa v Royal Dutch Petroleum Co.*, 226 F. 3d 88 (2d Cir., 2000) and *Estate of Rodriguez v Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala., 2003).

[169] *Filartiga*, *supra* note 167, at 881.

[170] See B. Stephens and M. Ratner, *International Human Rights Litigation in U.S. Courts* (1996), at 63 *et seq.*

[171] 28 U.S.C.A. § 1350 note (2000).

[172] See Stephens and Ratner, *supra* note 170, at 211 *et seq.*

[173] See S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd ed., 2001), at 247.

and the political question doctrine, have remarkably expanded the reach of human rights law.[174] Incidentally, this has also been a reason for attracting criticism on the grounds that municipal courts are no appropriate forum to decide questions involving the responsibility of foreign states and individuals and that customary international law may not provide individuals with causes of action enforceable before municipal courts.[175] Be that as it may, the legislation of the United States in this area, by permitting civil suits concerning acts not related with the forum at all stands out in international practice as a rather unique tool for adjudicating international human rights claims.

Indeed, whether the ATCA is merely a jurisdictional statute or, rather, also provides a cause of action for foreign plaintiffs either on the basis of customary international law or of state or foreign tort law has been the most controversial issue in the history of the Act.[176] As is known, courts have taken different views on the matter, the dissenting opinion by Judge Bork in *Tel Oren*[177] standing fiercely against the majority of other federal courts' holdings that have upheld that the ATCA not only grants jurisdiction but may also provide a cause of action.[178] The issue came to the fore again in *Alvarez Machain v US*, where the 9th Circuit found that the alleged prohibition under customary international law of arbitrary arrest and detention provided the plaintiff with a cause of action under the ATCA.[179] The Supreme Court granted certiorari on the very question whether the ATCA, besides being a jurisdiction-granting provision, might also create a private right of action and, if so, whether the challenged arrest in the case is actionable under Section 1350.[180] The grant of certiorari by the Supreme Court is clearly a sign that the controversial question of the nature of the ATCA was perceived as being ripe for decision. Should the court decide that the ATCA is a jurisdictional statute only, the search for a cause of action may indeed turn out to be a difficult task for plaintiffs. But even if the court upheld that the ATCA might provide a cause of action, it remains to be seen whether the Court will

[174] US Courts have refused to consider human rights abuses as 'official public acts' triggering the applicability of the act of state doctrine. See, among others, *Filartiga v Peña Irala*, *supra* note 167; *Forti v Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), reproduced in 95 *ILR* (1994), at 625 *et seq*.; *Evans et al. v Avril*, 812 F.Supp. 207 (S.D. Fla. 1993); *Kadic et al. v Karadzic*, 70 F. 3rd 232 (2nd Cir. 1995). See also the *Senate Report* on the *Torture Victim Protection Act*: 'Since this doctrine applies only to "public acts" and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.' (S. Rep. No. 249, 102d Cong., 1st Sess. 8 (1992)). Nor have courts easily resorted to the political question doctrine to dismiss ATCA cases: see, for instance, *Kadic v Karadzic*, at 248–250.

[175] For criticism see Curtis, Bradley and Goldsmith, 'The Current Illegitimacy of International Human Rights Litigation', 66 *Fordham L. Rev.* (1997) 319.

[176] See Born, *supra* note 7, at 46–47.

[177] See *Tel Oren v Libyan Arab Republic*, 726 F. 2d 774 (D.D. Cir., 1984), at 810–816 (Bork, J., concurring). Recently, along the same lines, see the opinion of Judge Rundolph in *Al Odah v United States*, 321 F. 3d 1134 (D.C. Cir., 2003) at 1147–1148.

[178] See Born, *supra* note 7, at 46–47.

[179] *Alvarez Machain v US*, 331 F 3d 604 (9th Cir. 2003).

[180] *United States v Alvarez Machain*, 124 S. Ct. 821 (2003).

concede that any such right of action can be inferred from customary international law.

In this respect it is interesting to note that the United States submitted an amicus curiae brief in support of the petitioner.[181] The United States maintained that, on the basis of its text and statutory history, the ATCA is strictly jurisdictional and that 'no cause of action may be inferred from customary international law norms that have not been affirmatively adopted and made enforceable by the political branches' of government, to which the Constitution entrusted the responsibility for managing foreign affairs. Dwelling further on separation of powers concerns, the brief underscores that litigation under the ATCA may have disruptive effects on the foreign policy of the United States[182] and runs counter to the presumption of non-extra-territorial application of federal statutes.[183] The stance taken by the US Government in the case is hardly surprising, as it corresponds to the attitude consistently taken by the Bush administration throughout its mandate.[184] What is perhaps rather more surprising is that other governments decided to submit an amicus curiae brief in support of the petitioner, maintaining that the ATCA as currently interpreted by US courts violates international law for the broad assertions of extra-territorial jurisdiction which have been made on its basis.[185] 'As global trading and investing nations, Australia, Switzerland and the United Kingdom', weary that US court determinations on alleged violations of the law of nations may 'deter legitimate enterprises from engaging in business and investment in poorer nations whose residents lives may be improved by the presence of such enterprises', urged that the ATCA be applied only to cases having an appropriate connection with the US, according to the international law of jurisdiction, or that involve US citizens.[186]

Should the Supreme Court yield to such pressure coming from its own and other governments and find in favour of the petitioner, the US would be practically deprived of one of the most powerful, albeit admittedly peculiar, instruments of international human rights litigation before domestic courts. The anomaly that the ATCA has long represented in the US legal system would be somewhat redressed and international customary law, once bereft of this avenue, would be relegated in its practical impact to the uncertain realm of its formal status within the US.

[181] Brief for the United States as Respondent Supporting Petitioner, 2003 U.S. Briefs 339.

[182] Specific reference is made to the class action brought by the victims of apartheid and its potentially negative impact on the relations between the United States and South Africa and on the latter's 'domestic efforts to promote both reconciliation and equitable economic growth' (*ibid.*, at 43–44).

[183] *Ibid.*, at 46 *et seq.*

[184] See O'Donnell, 'Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs?', 24 *B.C. Third World L. J.* (2004) 223.

[185] See Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner (No. 03–339).

[186] *Ibid.*, at 27–28.

11 Conclusion

This sketchy and selective overview of the attitude of US courts to international law unveils the tendency to frame international law within the general framework of the constitutional law discourse. The main tenets of American constitutionalism such as separation of powers and federalism often shape the posture of courts in determining issues bearing on international law. The fact that the relationship between international law and domestic law is often referred to under the heading of the 'foreign relations law of the United States' is quite illustrative of this approach.[187] The primacy of constitutional law ensues not only from the fact that '[a] rule of international law or provisions of an international treaty of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution',[188] but, more generally and quite understandably, from the sense that courts, particularly the Supreme Court, are entrusted with the task of preserving the integrity of the constitutional text and upholding the values underlying it. In this respect, there is nothing peculiar to US courts as compared to courts in other jurisdictions. However, the way in which the Constitution is interpreted and priorities are established among the values enshrined in it, including the consideration to be accorded to international law, vary over time and are strongly influenced by a number of extra-legal variables — all the more so, given the 'overtly political nature of American Constitutional law' as opposed to the European tradition.[189]

Fatally, when the ultimate question is asked of him and his supernatural origin is revealed, Lohengrin is bound to go back to the castle of the Holy Grail. Likewise, once its supranational nature and potential effects in domestic law are known, international law is often relegated to the realm of irrelevancy. If Elsa in Act III of Wagner's opera faints lifeless at Lohengrin's disappearance, one cannot say the same of the US legal system, which seems perfectly at ease with the way international law is dealt with by its courts. Its unconditional trust in its constitutional foundations and complete faith in its capacity to adjust the law to the demands of its society without tampering with the fundamental legal and political commitments of the Constitution represent the main feature of the US legal system in its relationship to international law. Ultimately, one may legitimately wonder if a 'fundamental postulate' inherent in the US Constitution can be traced, 'which prohibits the federal government from delegating any governmental authority over U.S. citizens to officials who are not accountable, directly or indirectly, exclusively to the American electorate'.[190] This principle of 'exclusive national democracy' seems to inspire the prevailing, albeit not exclusive, attitude of US courts towards international law at this point in time.

[187] It suffices to think of the title of the *Restatement*: *Restatement (Third) of the Foreign Relations Law of the United States*. See also Bradley and Goldsmith, *supra* note 6, and T. M. Franck and M. J. Glennon, *Foreign Relations and National Security* (2nd ed., 1993).

[188] See *Restatement*, at § 115 (3).

[189] See Rubenfeld, *supra* note 160, '. . . if the law is to be democratic, the law and courts that interpret it must retain strong connections to the nation's democratic political system'.

[190] Golove, 'The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority', 55 *Stan. L. Rev.* (2003) 1967, at 1697–1700.

Regardless of the formal instruments of incorporation, traditionally laid down in constitutions, the extent to which international law is actually used by courts within the formal constraints of constitutional arrangements largely depends on the legal culture prevailing at any particular time.[191] By this expression one refers to a wide array of very down-to-earth considerations, ranging from the lack of background in, or insufficient knowledge of, international law issues by judges, lawyers or government officials to their psychological attitude and personal inclinations. It would be a mystification to deny the relevance of these elements in assessing what is the role that international law plays in municipal legal systems. Having acknowledged the complexity of the task of evaluating the contours of the legal culture in any given jurisdiction, it would be simplistic to state that the way international law is treated at the municipal law level is immaterial to international law, as most commentators maintain by arguing that a state may not be exempted from its international responsibility if by the operation of its domestic law system it infringes an international law obligation.[192] In fact, the way international law is incorporated into the legal system, its status within it and the weight attributed to it in legal argumentation and judicial reasoning usually also reflects the way in which international law is perceived *per se* by that state. The argument is one of logic. If legal culture is a determining factor in shaping the attitude of legal operators internally, the same legal culture is going to affect them when they act externally at the inter-state level. This parallelism of patterns of behaviour should encourage the profession to abandon the long-retained conviction of the irrelevance of domestic law to international law. Lohengrin is no flawless, faultless knight to be unconditionally revered, but to let him attend to the Holy Grail in sacred solitude is not conducive to broadening the horizon of national legal communities, which, like it or not, are already embedded in a complex web of transnational legal relations. It would be desirable indeed that the Supreme Court take such considerations into account when deciding the various international law-related cases currently pending before it.[193]

[191] R. Higgins, *Problems and Process. International Law and How We Use It* (1994), at 206.

[192] D. Bederman, *International Law Frameworks* (2001), at 154.

[193] As this article went to press, the Supreme Court had just handed down its judgments in the following cases: *Hamdi v Rumsfeld*, 2004 U.S. LEXIS 4761; *Rasul v United States*, 2004 U.S. LEXIS 4760; *Rumsfeld v Padilla*, 2004 U.S. LEXIS 4759; *Sosa v Alvarez-Machain*, 2004 U.S. LEXIS 4763. At first glance, the Court has only partially been receptive to the considerations underlying the wish expressed in the last sentence of the text.