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From Neglect to Defiance? The United States and International Adjudication

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Abstract

Recent decisions by the three branches of the US Government have displayed contradictory attitudes towards international adjudication. The executive branch disputed the reasoning of the International Court of Justice in the Avena, Oil Platforms, *and* Wall *cases, but continues to appear before the Court. While the US Supreme Court confirmed the 'recognition' by the US legal order of international law in general and human rights law in particular, it also denied the review of the death penalty for a Mexican national, Osvaldo Torres, despite the Avena proceedings. Yet, following the 2004 ICJ Avena decision, Oklahoma reversed the death penalty for Torres. At the same time, the US Congress prepared the implementation of the WTO dispute settlement ruling on Foreign Sales Corporations, and the Senate considered giving its advice and consent to the ratification of the UN Convention on the Law of the Sea, and thus to new mandatory dispute settlement. US attitudes are heavily influenced by the effects of international adjudication on domestic constituencies. In the eyes of many Americans, popular sovereignty renders decisions of international judges dubious. But the US, as the world's only superpower, has considerable stakes in international order and is thus unlikely to withdraw from international dispute settlement altogether.*

> The 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 binding authority through treaty.
>
> Justice Stephen Breyer[1]

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1 *Torres v Mullin*, 124 S.Ct. 562 (Mem), 540 U.S. –– (2003), (Breyer, J., dissenting).

1 Introduction

The attitude of the United States towards international adjudication seems to have reached another low point. On 17 November 2003 the US Supreme Court openly defied the International Court of Justice (ICJ) by denying the review of a death penalty case in which the convicted foreign national, the Mexican Osvaldo Torres, had not been informed of his rights to communicate with, and receive support from, the Mexican consulate upon his arrest.[2] This denial happened one month before the oral proceedings in the *Avena* Case, in which Mexico had brought the repeated non-observance of this right before the ICJ (including the case of Mr Torres), and in spite of an order in which the Court had unanimously indicated that '[t]he United states of America shall take all measures necessary to ensure that . . . Mr. Osvaldo Torres Aguilera [is] not executed pending final judgment in these proceedings.'[3] Two years earlier, in the *LaGrand* case, a German national was executed notwithstanding another order of the Court on provisional measures to the contrary, in which the Court had held that provisional measures are legally binding on the parties to a particular case.[4] Thus, one may be tempted to describe the relationship between the US, an early champion of the peaceful settlement of disputes by judicial means[5] (and international law) as one of permanent decline, in which the current administration, with its proudly declared unwillingness to seek permission from others,[6] is only signing the death certificate of binding international adjudication of US commitments.

However, such a conclusion would be premature. Torres was not executed; the Governor of Oklahoma commuted his sentence to life imprisonment, citing the decision of the International Court of Justice,[7] while the Oklahoma Court of Criminal Appeals sent the case back to a lower court.[8] The US has also resisted, so far, the

2 *Ibid.*, denial of writ of certiorari, Breyer, J. dissenting. See also the opinion by Stevens, J., 124 S.Ct. 919 (Mem). For sharp criticism of the majority decision see Leavitt, 'How the U.S. Supreme Court Recently Refused to Enforce U.S. Law, and Insulted the International Court of Justice', Nov. 20, 2003, available at http://www.findlaw.com (visited 1 March 2004).

3 *Avena and Other Mexican Nationals (Mexico v United States of America)*, Provisional Measures, Feb. 5, 2003, 42 *ILM* (2003) 309, also available at http://www.icj-cij.org (visited 1 March 2004), para. 59.

4 *LaGrand (Germany v United States of America)*, ICJ Reports (2001), 466, para. 128 (5).

5 See Simma, 'International Adjudication and U.S. Policy — Past, Present, and Future', in: Dorsen/ Gifford (eds), *Democracy and the Rule of Law* (2001) 39, at 41 *et seq.*

6 See G. W. Bush, State of the Union Address, 8 January 2003, available at http://www.whitehouse.gov (visited 1 March 2004): 'Yet the course of this nation does not depend on the decisions of others.' See also *Idem.*, State of the Union Address, 20 January 2004, available at http://www.whitehouse.gov (visited 1 March 2004), arguing that the US does not need a 'permission slip' from the Security Council to pursue US security interests.

7 *Avena and Other Mexican Nationals (Mexico v United States of America)*, 31 March 2004, available at http://www.icj-cij.org.

8 *Torres v Oklahoma*, Case No. PCD-04–442 (Okl.Cr. 13 May 2004).

temptation to follow its own bad example in the *Nicaragua* case[9] and simply stay away from a Court that has found it so often in breach of its international obligations.[10] The US has vehemently resisted the creation of the International Criminal Court and the subjection of US nationals abroad to its jurisdiction, but it was also instrumental in the establishment of a more legalized trade dispute settlement system in the World Trade Organization (WTO). Only recently, the US lifted its steel tariffs, to the reported chagrin of US President George W. Bush, who discovered that his freedom to introduce new tariffs is severely limited by the need for a 'permission slip' from the WTO Dispute Settlement Body.[11]

Thus, the assertive hegemony of the current administration masks rather than unveils the impact of international adjudication on the US, if less so in the great political affairs of war and peace, then at least in the apparently minor, 'technical' areas of international cooperation. In fact, a superpower has sometimes as much interest in reliable international relations as lesser powers. The leading economic and technological power in the world and its citizens and businesses depend on free trade and the freedom of the high seas. The proclaimed 'war on terrorism' requires the cooperation of governments and criminal law systems around the world. Thus, the sole superpower will continue to have a considerable stake in international adjudication. However, the US record regarding international adjudication cannot be traced back to its status as sole superpower alone.

This article suggests further reasons for a certain disenchantment of the US with respect to international adjudication. The democratic tradition of the US, in which the government cannot rely on a majority in the legislature, sometimes stands in the way of the acceptance of rulings by 'unelected' international judges. Fifty state systems differ in their respect for international rulings. As the following analysis shows, the US remains committed to binding international dispute settlement when strong domestic

[9] *Military and Paramilitary Activities (Nicaragua v United States of America)*, ICJ Reports (1986), 392.

[10] The US 'lost' more or less in the *Nicaragua* (ICJ Reports (1986), 392), *ELSI* (ICJ Reports (1989), 15), *LaGrand* (ICJ Reports (2001), 466) and *Avena, supra* note 7, cases. The US can also claim a partial win due to the rejection of Mexican claims that consular information has to be immediate and that the Convention requires the suppression of evidence and the annulment of judgments after a failure to inform, *Ibid.*, paras. 87, 123–126. See also the recommendations of the Court in paras 64, 149; the US 'won' on jurisdictional grounds or because of the discontinuance in *Use of Force (Yugoslavia v United States of America)*, ICJ Reports (1999), 916, and *Questions of Interpretation and Application Arising From the Aerial Incident at Lockerbie (Libya v United States of America)*, Order of 10 September 2003, available at http://www.icj-cij.org (visited 1 March 2004), as well as in *Vienna Convention on Consular Relations* (ICJ Reports (1998), 248 at 426). In substance, it won in *United States of America Diplomatic and Consular Staff in Tehran,* ICJ Reports (1980), 3 only. In *Oil Platforms (Iran v United States of America)*, Judgment, 6 November 2003, available at http://www.icj-cij.org (visited 1 March 2004), the US was also victorious because of the narrow scope of ICJ jurisdiction under the Treaty on Friendship, Commerce, and Navigation between the United States of America and Iran, but the Court implicitly held the US in violation of the international law on the use of force. *Delimitation of the Maritime Boundary in the Gulf of Maine Area,* ICJ Reports (1984), 246, is not included here because maritime delimitation is not open to this kind of analysis. The *Aerial Incident of 3 July 1988 (Iran v United States of America)* case was discontinued after the US paid compensation to Iran.

[11] Sanger, 'A Blink from the Bush Administration', *N.Y. Times*, 5 December 2003, p. A28.

interests are at stake, for example with regard to trade sanctions in the framework of the WTO dispute settlement system or the law of the sea. This article will first look at the practice of the US in international adjudication and then proceed to an analysis of the attitude of the three branches of the federal government and the federal states. In the conclusion, the article will look at the future perspectives for US involvement in international adjudication.

2 From Champion to Sceptic: The US before International Courts and Tribunals

In its early years, the US was a weak state that had to establish itself in international society, in particular with respect to the leading great power of the time, the British Empire. It is thus not surprising that the young nation favoured judicial means of dispute resolution based on the equality of the parties under law. But the international adjudication of disputes was also compatible with the ideology of a nation that emphatically favoured the government of laws over the government of men.[12] Our analysis will begin with the early US championship of international arbitration and adjudication and then turn to US involvement with the International Court of Justice. Subsequently, the article will look at the attitude of the US within the WTO dispute settlement system and with respect to the International Criminal Court.

A *The US as Promoter of International Adjudication*

In its early history, with the Jay Treaty[13] and the Alabama arbitration,[14] the US was an innovative force furthering arbitration as a means for solving international disputes. Even after it had established itself as a rising great power, at the Hague Peace Conferences in 1907, the US championed the compulsory arbitration of disputes. It was so disappointed by the modest result of the commission that it abstained.[15] However, the US ratified the Hague Convention with only one reservation regarding the Monroe doctrine and political questions.[16] The US Senate further limited the scope of US obligations in arbitration treaties, demanding its consultation and consent to every single *compromis*. In addition, the Senate explicitly excluded 'political' disputes regarding 'the vital interests, the independence, or the honor of the' parties from

[12] Cf. Simma, *supra* note 5, at 56.

[13] J.B. Moore, 1 *History and Digest of the International Arbitrations to which the United States Has Been a Party* (1898), at 29. On its importance see M.Z. Khan, *ICJ Yearbook* (1971–72), 130; Seidel, 'The Alabama', 1 *EPIL* (1992) 97; Simma, *supra* note 5, at 41–42.

[14] For the treaty, see 143 *Consolidated Treaty Series* (CTS) 145 (1871–72) for the text of the award, see 145 CTS 99 (1872–3); Moore, 1 *History and Digest, supra* note 13, at 546–678; Schlochauer, 'Jay Treaty (1794)', III *EPIL* (1997) 4; Simma, *supra* note 5, at 42–43.

[15] Simma, *supra* note 5, at 45.

[16] Hershey, 'Convention for the Peaceful Adjustment of International Differences', 2 *AJIL* (1908) 29, at 45; James Brown Scott (ed.), *Texts of the Peace Conferences at the Hague*, at 90; *Idem.*, *The Proceedings of the Hague Peace Conferences: The Conference of 1899*, at 99–100.

compulsory dispute settlement.[17] In the inter-war period, the US Senate twice rejected proposals to join the Permanent International Court of Justice (PICJ), which required a two-thirds majority.[18] It is however interesting to note that US hostility towards the PICJ did not reach the same level of opposition to the League of Nations. Some irreconcilable adversaries of the League and fervent isolationists such as Senator William Borah (R-Idaho) even introduced a resolution in favour of a true World Court modelled on the US Supreme Court.[19] Thus, US acceptance of the 'optional clause' after World War II, including the famous reservations named after Senators Connally and Vandenberg,[20] can be viewed just as much as an exception to, as well as an expression of, previous US history.

B *The US and the ICJ*

The early years of the ICJ constitute the highest level of US engagement with the 'principal judicial organ of the United Nations' (Article 92 UN Charter). When the Court was in crisis in the 1970s, the US went out of its way to propose sweeping changes for its revitalization.[21] Until 1979, US acceptance was never seriously tested, neither internationally nor domestically. When the US itself became the focus of the Court,[22] this positive attitude changed considerably. In the 1980s, the US turned from a supporter to a sceptic of international adjudication.

As with any other state, the US has tried to shield itself from legal evaluations of its behaviour. In addition, whereas recourse to judicial means against the US may well be the only means available for smaller states to draw the attention of the US Government to their grievances, the US, as the sole superpower, usually has alternative political means at its disposal. And yet, states do not only act in their short-term interest, but also within a long-term perspective: not any argument will do, not in front of the Court, nor, more importantly, in the view of international public opinion. Thus, the US has time and again emphasized certain points that imply a severe limitation of the role of the ICJ: in the scope of its jurisdiction (already considerably limited by the overarching requirement of consent to its jurisdiction); in

[17] See 'Editorial Comment: The American Theory of International Arbitration', 2 *AJIL* (1908) 387, at 390; for an overview of such treaties, see 'Editorial Comment: Treaties of Arbitration since the First Hague Conference', 2 *AJIL* (1908) 823. Cf. M. Dunne, *The United States and the World Court, 1920–1935* (1988), at 13.

[18] For details see Dunne, *supra* note 17, *passim*.

[19] S.R. 441, 67 *Cong. Rec.* 3605 (1923). See also Dunne, *supra* note 17, at 76.

[20] For the text, including the Connally and Vandenberg reservations on domestic jurisdiction and multilateral treaties, see *I.C.J. Yearbook* 1984–85, at 100.

[21] See *Digest of the United States Practice in International Law* 1976, at 650–651, proposing, *inter alia*, withdrawing the Connally amendment on domestic jurisdiction and allowing the United Nations to appear before the Court. The Department also proposed allowing national courts to request advisory opinions.

[22] The early cases involving the US were either rejected because of lack of jurisdiction or could be regarded as a draw, such as *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, ICJ Reports (1952), at 176 (Aug. 27).

the legal effects of its judgments and provisional measures; and in its relationship with other organs of the United Nations, in particular the Security Council.

However, this has not always been the case. When the US turned to the Court during the *Tehran Hostages* crisis in the last year of the Carter presidency, it forcefully argued in favour of an active role for the Court in indicating provisional measures and in granting reparation, independent of the UN Security Council.[23] The judgment, however, despite its unequivocal rejection of Iranian hostage-taking, was something of a disappointment: the Court did not directly attribute the hostage-taking to the Iranian Government, and the final judgment included a paragraph condemning the failed US rescue mission as an interference with the peaceful settlement of disputes.[24]

Thus, in spite of a later ruling in a maritime delimitation case, which was quite favourable to the US,[25] US patience wore thin when Nicaragua sued the US because of its support for the Contras and the mining of Nicaraguan ports. The Reagan administration was, like the current one, not willing to allow international institutions such as the ICJ to intervene in the pursuit of US policies. The bad conscience of the US Government was visible when it prepared an exit strategy early on, attempting, without success, to modify its acceptance of the optional clause *ad hoc* by excluding cases arising in the Central American context.[26] After the Court had assumed jurisdiction of the case, arguing, *inter alia*, that the Vandenberg reservation barred the application of the UN Charter, but not the basically identical customary international law on the matter,[27] the US was dismayed by what it regarded as an unequivocal example of judicial overreach, and withdrew from the system of the optional clause altogether. It also disregarded the judgment itself and vetoed measures of implementation by the Security Council under Article 94, para. 2 of the Charter.[28] The reaction of US international lawyers to the *Nicaragua* case was decidedly mixed — with criticism of the Reagan administration, but also of the Court for its broad assumption of jurisdiction.[29]

The differences in the arguments put forward by the US in the *Hostages* and the *Nicaragua* cases are striking. In the former, the US adopted a broad view of the role of the Court; in the latter, the US tried to limit the Court's room for manoeuvre by

[23] See *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, I.C.J. *Pleadings*, p. 25 *et seq.*, 156 *et seq.*

[24] *United States Diplomatic and Consular Staff in Tehran,* ICJ Reports (1980), *3*, at 41, para. 93. For an immediate and relatively positive assessment see Gross, 'The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures', 74 *AJIL* (1980) 395; Stein, 'Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt', 76 *AJIL* (1982) 499.

[25] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), at 246.

[26] See *Military and Paramilitary Activities in and against Nicaragua (Nic. v US), Jurisdiction and Admissibility, Judgment*, ICJ Reports (1984), 392, at 398, para. 13; at 415, paras. 52 *et seq.*

[27] *Military and Paramilitary Activities in and against Nicaragua (Nic. v US), Jurisdiction and Admissibility, Judgment,* ICJ Reports (1984), 392 at 424, para. 73.

[28] For a detailed account see C. Schulte, *Compliance with Decisions of the International Court of Justice* (2004), at 184 *et seq.*

[29] See only the Editorial Comments on the ICJ decision in 1984, 79 *AJIL* (1985) 373 *et seq.* (mostly arguing for the amendment, not abrogation of the acceptance of compulsory jurisdiction by the US) and Maier (ed.), 'Appraisals of the I.C.J.'s Decision: Nicaragua v United States (Merits)', 81 *AJIL* (1987) 77 *et seq.*

excluding 'political questions' from its purview. According to this argument, the Charter exclusively reserves intervention in questions of war and peace for the political organs of the United Nations,[30] in particular the Security Council — a Council, of course, where the US can block any decision on non-procedural matters by the exercise of its veto power under Article 27 para. 3 of the Charter. Echoing the 'political questions' doctrine in domestic constitutional litigation,[31] the judicial character of the Court is said to require a similar approach.[32] This line of argument amounts to nothing less than a claim of unfettered political discretion. Maybe there is a law on the use of force, but the Security Council is not bound by it — the criteria of the Charter giving the Council broad political latitude independent of the legality *vel non* of the threat to peace and security in question. States have the inherent right to self-defence, but if the Security Council does not weigh in — and the veto powers may prevent it from doing so — the use of self-defence will remain unchecked.[33] Recently, in the *Oil Platforms* litigation, the US argued that the security exception in the Treaty on Friendship, Commerce and Navigation with Iran, as well as the right to self-defence in general, should be understood as giving maximum discretion to the state parties.[34] In its judgment, the Court rejected this approach and decided that the US had failed to show that its measures were necessary and proportionate in the sense of the security exception.[35] Again, the US demonstrated that it purports to exclude measures regarding international peace and security from international judicial scrutiny.

Similarly, the United States has argued that the Court should not follow the requests by the UN General Assembly to render advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons* and, recently, on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[36] In the first instance, however, the United States added substantive remarks in case the Court would opine otherwise, and also appeared before the Court; in the latter case, the United States limited itself to a

[30] Counter-Memorial, *I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Vol. II, p. 1, at 149, para. 478; p. 138, para. 450; p. 139, para. 454.

[31] For an authoritative statement on the political question doctrine, see *Baker v Carr*, 369 U.S. 211, 217; 82 S.Ct. 691, 706 (1962).

[32] *Cf. I.C.J. Pleadings, Nicaragua, supra* note 30, at 9, para. 26.

[33] US Counter-Memorial, *I.C.J. Pleadings*, Nicaragua, *supra* note 30, p. 165, para. 516: 'Article 51 permits only the Security Council to take action with respect to claims of self-defense, and a judgment on the question by the Court would constitute an entry into the field of competence reserved to the Council in this regard.'

[34] *Oil Platforms*, Counter-Memorial and Counter-Claim Submitted by the United States of America, 23 June 1997, at 108 *et seq.*, 128 *et seq.*, available at http://www.icj-cij.org (visited 1 March 2004); Rejoinder submitted by the United States of America, 23 March 2001, at 143–44 *et passim*, available *Ibid.*; Oral Pleadings, 21 February 2003, Doc. CR 2003/9, paras. 1.31. *et seq.* (Taft), *Ibid.*; 26 February 2003, CR 2003/12, paras. 17.40 *et seq.* (Weil), 18.42 *et seq.* (Matheson), available *Ibid.*

[35] *Oil Platforms (Iran v US)*, Judgment, 6 November 2003, paras. 43 *et seq.*, 125(1), available at http://www.icj-cij.org (visited 1 March 2004).

[36] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Written Statement of the Government of the United States of America, 20 June 1995, at 3–4, available at http://www.icj-cij.org (visited 15 July 2004); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Statement by the United States of America, 30 Jan. 2004, available at http://www.icj-cij.org (visited 15 July 2004).

Written Statement extensively arguing that the Court should decline to deliver an opinion. After the most recent opinion on the barrier in the occupied Palestinian territories was delivered, the executive branch alleged a political (ab)use of the Court, and the House of Representatives adopted a resolution to the same effect.[37] In spite of the moderate tone of the official criticism of the Wall opinion, it is to be feared that the ICJ Opinion has further alienated a substantial part of the US Government and public from the Court.

Another count on which the US has — mostly successfully — tried to limit the jurisdiction of the Court is the narrow interpretation of its jurisdictional basis. After withdrawing its acceptance of the optional clause in the wake of *Nicaragua*, the US has also denied the existence of any obligation to submit certain cases to the Court without its specific consent, adding respective reservations to treaties with compromissory clauses.[38] In *Legality of Use of Force*,[39] the US thereby avoided scrutiny. In remaining cases, US consent to the jurisdiction of the Court in contentious proceedings is limited to treaties in force in the mid-1980s, either of a bilateral or a multilateral nature. The former are mostly so-called FCN treaties regarding friendship, commerce and navigation, the latter are multilateral codification conventions, such as the Vienna Conventions on Diplomatic and Consular Rights.

However, the US also attempts to limit existing obligations by construing treaty clauses as narrowly as possible. Thus, in the *LaGrand* case, the US argued that the jurisdiction of the Court under the Optional Protocol did not extend to secondary obligations of implementation and adjudication, such as the law of diplomatic protection or state responsibility.[40] In substance, it suggested that the Vienna Convention on Consular Relations was limited to inter-state obligations and could in no way be interpreted as establishing individual rights, in spite of the contrary wording of Article 36 of the Convention.[41] Another focus of the US argument was the shielding of its judicial system from any interference by the Court, arguing that the ICJ should not 'assume an inappropriate and unauthorized role as the overseer of U.S. national courts'.[42]

The US record regarding compliance with ICJ judgments is decidedly mixed. In the

[37] For the US reaction to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., 9 July 2004, available at http://www.icj-cij.org (visited 15 July 2004), see Explanation of Vote by Ambassador James B. Cunningham, 20 July 2004, USUN Press Release 135(04), available at http://www.un.in/usa (visited 29 July 2004); U.S. House of Representatives, Deploring the misuse of the International Court of Justice by a plurality of the United Nations General Assembly for a narrow political purpose, H.R. 713, 104th Cong. (2004).

[38] See, e.g., the reservations to the 1948 Genocide Convention, the 1984 UN Convention against Torture, and the 1997 International Convention for the Suppression of Terrorist Bombings, in Multilateral Treaties Deposited with the Secretary-General, available at http://untreaty.un.org (visited 1 March 2004).

[39] See *Legality of Use of Force* (*Yugoslavia v US*), ICJ Reports (1999), at 916 (case removed from the list).

[40] *LaGrand (Germany v US),* Counter-Memorial of the United States of America, 27 March 2000, paras. 73–75, available at http://www.icj-cij.org (visited 1 March 2004).

[41] *Ibid.*, para. 97.

[42] *LaGrand*, US Counter-Memorial, *supra* note 40, para. 51.

Nicaragua case, the US chose the course of open defiance and disrespect for both the Court proceedings and the resulting judgment.[43] Only a short time later, however, it brought the *ELSI* case to the Court, based on a specific consent between the US and Italy, and accepted the negative outcome.[44] It implemented the *Gulf of Maine* judgment and settled the *Aerial Incident* case with Iran at a preliminary stage.[45] Instead of adapting its domestic law to the pronouncements of the Court, the US settled the *Breard* case with Paraguay by a formal apology for the violation of the Consular Convention, but not for the ensuing execution.[46] The US also maintained, both internationally[47] and domestically,[48] that the provisional measures pronounced by the Court were neither legally binding nor directly applicable in the domestic legal order, an argument challenged by Germany and later rejected by the Court.[49] However, the US has followed provisional measures pronounced by the Court in the *Avena* case,[50] after the Court had decided in *LaGrand* that these measures are binding, despite some difficulty in communicating these measures to independent-minded state officials and a disengaged US Supreme Court.[51] It remains to be seen whether the US will also be willing to make considerable changes in its domestic law to implement the recent *Avena* decision on consular access.[52]

Since the *Tehran Hostages* case, the US has thus, at best, a mixed record before the Court. However, the open defiance displayed in the *Nicaragua* case has remained an aberration. Nevertheless, the case defused any US enthusiasm for the judicial settlement of international disputes. Rather, the US behaves like most other nations do: try to avoid exposure to the Court, ask the Court for settlement only in technical

[43] See the debate of the Security Council on a resolution on the implementation of the judgment, S/PV.2704, 25 *ILM* (1986) at 1363; and UN GA Res. 41/31, 3 November 1986, UN Doc. A/41/PV.53, at 92 (adopted 94–3–47). Schulte, *supra* note 28, claims that in spite of US non-compliance, the judgment had a positive effect on the resolution of the Central American conflict.

[44] *ELSI (US v Italy)*, ICJ Reports (1989), 15.

[45] *Aerial Incident of 3 July 1988 (Iran v US)*, ICJ Reports (1996), 9.

[46] See Aceves, 93 *AJIL* (1999) 924, at 927.

[47] *Counter-Memorial of the United States of America*, *supra* note 40, paras. 128 *et seq.*

[48] See *Paraguay v Gilmore*, *Breard v Greene*, Brief for the United States as Amicus Curiae, April 1998, cited in Charney and Reisman, 'The Facts', 92 *AJIL* (1998) 666, at 672–73; Letter of US Secretary of State Albright to the Governor of Virginia, 13 April 1998, cited in Aceves, 92 *AJIL* (1998) 517, at 520; see also Letter of US Secretary of State Albright to the Chairman of the Texas Board of Pardons and Paroles in the case of Stanley Faulder, 27 November 1998, *LaGrand*, German Memorial, Annex 61. Faulder was executed regardless. On the complete absence of consideration given to her request, see Transcript of Evidentiary Hearing 21 and 22 December 1998, *Faulder v Texas Board of Pardons and Paroles, et al.*, No. A-98-CA-801, at 269–70, cited in *Avena*, Memorial of Mexico, 20 June 2003, para. 265, available at http://www.icj-cij.org (visited 1 March 2004); see also the letters in the *Valdez* case, in: Murphy, 'Contemporary Practice of the United States', 96 *AJIL* (2002) 461, at 462 (requesting the 'review and reconsideration' required by LaGrand as part of clemency proceedings).

[49] *LaGrand (Germany v US)*, ICJ Reports (2001), 466.

[50] *Avena and other Mexican Nationals (Mexico v US)*, *Provisional Measures*, *supra* note 3.

[51] For the implementation of the Provisional Measures, see the recognition of compliance by Mexico, *Avena*, Oral Proceedings, Dec. 15, 2003, CR 2003/24 (Gomez Robledo), para. 44, available at http://www.icj-cij.org (visited 1 March 2004).

[52] For greater details, see *supra* note 10.

cases, as it were, and belittle your own obligations as much as possible. As the sole superpower, the US can well afford to limit the scope of jurisdiction of the Court and to solve disputes with other states by political rather than judicial means. But the US interest in stability, and maybe also the great US legal tradition, have so far prevented a complete break with the Court.

C *The US and the Pluralism of Adjudicatory Bodies in the Age of Globalization*

In the age of globalization, there are many and diverse means for the settlement of disputes. Some regard this development as indicative of a new wave of judicialization of international relations, others are concerned by the proliferation of international judicial institutions.[53] Thus, any evaluation of US practice and international adjudication that concentrates on the ICJ alone will miss an important part of the picture. It is not possible here to comprehensively analyse US attitudes towards each and every international institution. The following remarks are therefore limited to the two areas where adjudication has recently played a prominent role: the quasi-adjudication of the WTO dispute settlement body (DSB) and the new international criminal courts and tribunals. An analysis of US attitudes towards international arbitration must wait for another day [54] as well as of the US involvement with the UN and OAS human rights bodies.[55] Suffice it to say that the US has not joined the individual complaint mechanisms included in their respective treaty systems.

1 The US and WTO Dispute Settlement: Trade Adjudication and 'Sovereign Implementation'

In the light of its reluctant attitude towards international adjudication since the 1980s, US acceptance of the WTO dispute settlement system appears all the more remarkable. Two important considerations may account for this development:

[53] On the discussion of the alleged 'legalization' of international relations, see, e.g., O'Connell *et al.*, 'The Legalization of International Relations', *ASIL Proceedings* 96 (2002), 291–308; Goldstein *et al.*, 'Legalization and World Politics: A Special Issue of International Organization', 54 *Int'l Org.* (2000). On the 'proliferation' of international courts and tribunals, see, e.g., 'Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle', 31 *New York University Journal of International Law and Politics* (1999) 679; Buergenthal, 'The Proliferation of International Courts and Tribunals: Is It Good or Bad?', 14 *Leiden JIL* (2001) 267; Charney, 'Is International Law Threatened by Multiple International Tribunals?', 217 *Recueil des Cours* (1998) 101; Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden JIL* (2002) 553.

[54] The Iran-US Claims Tribunal, which ultimately settled the Tehran Hostage crisis, is the best example for the importance of arbitration in US practice, see Iran-United States: Settlement of the Hostage Crisis, 19 January 1981, 20 *ILM* (1981) 223; Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, reprinted in 75 *AJIL* (1981) 422, 20 *ILM* (1981) 230.

[55] On the US and human rights generally, see the contribution to this symposium by Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11', 15 *EJIL* (2004) 721.

whereas the US position as a political superpower is uncontested, it must share hegemony on trade issues with Europe, Japan, and increasingly East Asia and the emerging great powers of China, India and Brazil. If evidence were necessary, it was provided by the recent failure of the WTO Cancún Ministerial Conference, in which developing countries rejected both the US-EU's agricultural policies and the inclusion of social rights and environmental issues in the WTO agenda.[56] For all its shortcomings, international adjudication appears to be the most reliable and stabilizing mechanism to solve trade disputes. In other words, a functioning trade system is considered to be beneficial for both sides, so that a less advantageous solution of a dispute is, in principle, superior to any attempt to impose a more favourable outcome by the non-judicial means of political pressure. Indeed, the realization that the US has more to lose than to gain by disrespecting WTO rulings may have played a significant role in US compliance so far. Thus, the US does not only appear as respondent, but very often as complainant before the DSB, often driven by private interests within the US.

Of course, this does not imply that trade disputes are easy to solve. What may be true in the long term — trade is good for all participants — is not necessarily good in the short term. Therefore, the emergence of judicial settlement in a world trading system dominated by democratic states is indeed a historic achievement, as is the acceptance of this system, if grudgingly, by the US. In spite of a vigorous trade debate in the presidential primary season, no major candidate has advocated withdrawal from the WTO.[57] The US Congress has left the door open for both a temporary non-observance of WTO rules and eventual complete US withdrawal. It maintains Section 301 of the 1974 US Trade Act, which allows for the unilateral enforcement of US claims, thereby substituting third party adjudication within the WTO system[58] and preserving the right to leave the WTO following a report by the US Trade Representative.[59] Both avenues appear increasingly unlikely and were included for political appeasement rather than for practical use. A WTO panel has regarded the US law in itself as not being in violation of Article 23 of the Dispute Settlement Understanding (DSU), which contains a duty for state parties to have recourse to and abide by the WTO rules and procedures and to abstain from unilateral determinations regarding the inconsistency of state conduct with the WTO agreements.[60] The administration stated, with approval of Congress, that its discretion is limited with respect to the application of Section 301 ff. to measures declared inconsistent by the

[56] See the ministerial statement and the press conference by Chairperson Luis Ernesto Derbez, 14 September 2003, in: Day 5: Conference ends without consensus, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (visited 1 March 2004).

[57] The only candidate who has called for withdrawal, US Representative Dennis Kucinich, did not receive much support in the Democratic primary.

[58] 19 U.S.C. 3535; 108 Stat. 4809.

[59] Uruguay Round Agreements Act, 19 U.S.C. 2411; 19 U.S.C. 3512.

[60] *United States-Sections 301–310 of the Trade Act of 1974*, Report of the Panel, 22 December 1999, paras. 7.37, 7.38, 7.95–7.97, Doc. WT/DS152/R, 39 *ILM* (2000) 452, at 467–68, 476; adopted by the Dispute Settlement Body on 27 January 2000, Doc. WT/DS152/14, 28 February 2000.

Dispute Settlement Body.[61] In the same proceedings, the US, in particular the powerful Trade Representative, stressed its intent to fully implement DSU rulings.

The recent case of US steel tariffs may serve as an illustration: in the *Steel Products* case,[62] the US tried to impose tariffs for the protection of domestic steel producers. Fearing retaliation by the eight claimants in the case, the US withdrew the tariffs briefly after the ruling by the Appellate Body,[63] without, however, referring to the ruling itself. President Bush merely remarked that 'an integral part of our commitment to free trade is our commitment to enforcing our trade laws'.[64] Thus, when the US follows a ruling of the WTO Appellate Body, it does not want to be seen as simply bowing to an adverse judicial pronouncement. Rather, eventual compliance is cloaked in the language of sovereignty and independent decision-making. Nevertheless, as long as compliance occurs, such political window-dressing is far less important than the actual implementation of the DSB ruling.

Why does the US implement WTO rulings far more willingly than the more formal results of ICJ proceedings? The response appears both easy and difficult; easy, because the threat of real sanctions suffered by domestic constituents provides enough material incentives for compliance, in particular when domestic pressure groups weigh in; and difficult, because trade is far more controversial and politically charged at home than, say, the treatment of aliens by the judicial system.

2 The US and the Adjudication of International Criminal Justice

The evolution of the US position towards international criminal justice echoes the story of the US and the ICJ. While the US was the driving force behind the establishment of the Nuremberg Tribunals and the International Criminal Tribunal for the Former Yugoslavia (ICTY), it is now leading a ferocious campaign against the International Criminal Court (ICC), a court which the US had also supported early on. Of course, there is an easy explanation for the change of attitude: the Nuremberg Tribunals did not possess jurisdiction over US nationals; and in spite of its theoretical jurisdiction over US troops in the Balkans, the ICTY has avoided exercising its jurisdiction over US troops in Kosovo.[65] The International Criminal Court, however, might prosecute US nationals, not only in the increasingly unlikely eventuality of the

[61] *Ibid.*, 9 *ILM* (2000) 478.

[62] *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body, 10 November 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (visited 1 March 2004).

[63] Steel Proclamation, 4 December 2003, available at http://www.whitehouse.gov (visited 1 March 2004).

[64] See President's statement on Steel, 4 December 2003, available at http://www.whitehouse.gov.

[65] See Final Report to the ICTY Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 8 June 2000, 39 *ILM* (2000) 1257; cf. Amnesty International, 'Collateral Damage or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force', 6 June 2000, Doc. AI Index EUR 70/018/2000; Initial Comments on the Review by the International Criminal Tribunal for the Former Yugoslavia of NATO's Operation Allied Force, 13 June 2000, AI Index EUR 70/030/2000, both available at http://www.amnesty.org (visited 1 March 2004). For the hostile reaction in the US to the very idea of NATO being subject to the ICTY, see US Representative Lester Munron: 'You're more likely to see the U.N. building dismantled brick-by-brick and

US acceding to it, but also by way of the exercise of territorial jurisdiction by the ICC over member states.[66]

However, US hostility towards the prosecution of its nationals by the ICC is only part of the story. Indeed, as long as the US does not accede, the prosecution of US nationals remains highly unlikely, not only because of the virulent measures undertaken by the US to prevent such a situation from occurring,[67] but also because the American (mis)perception of the purpose of the ICC as an attack on US values and interests is indicative of an attitude towards international adjudication which has gained ground not only among neo-conservatives and acolytes of unilateral US power, but also in other quarters. The American Servicemembers Protection Act,[68] which was approved by huge margins in both houses of Congress, and supported by the Bush administration after changes preserving executive prerogative,[69] testifies to a widespread hostility towards the direct influence of international judges within the domestic legal sphere, in particular regarding individual rights of US citizens. Some have gone so far as to argue that the ICC endangers democracy and the world order.[70] Why this perception of the ICC as an essentially anti-American project?

On the one hand, concerns for sovereignty play a major role. Many moderate American lawyers have difficulty accepting that a state party may decide to send foreigners, when encountered on their territory, to an international body, whereas the US, on the basis of reciprocity, is ready to extradite its own nationals to other states for prosecution.[71] For many Americans, the idea of an international institution prosecuting and punishing US nationals is unsustainable because an international court is not subject to the same checks and balances as a domestic court. For many

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thrown into the Atlantic than to see NATO pilots go before a U.N. Tribunal.', cited by Colangelo, 'Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor Not to Investigate NATO Bombing in the former Yugoslavia', 97 *Northwestern University Law Review* (2000) 1393, at 1435.

66 See Rome Statute of the International Criminal Court, Art. 12.

67 See Security Council 1422 (2002), achieved by a veto threat for all peace-keeping operations that can only be called blackmail; and the so-called Article 98 agreements of questionable legality, Murphy, 'U.S. Efforts to Secure Immunity from ICC for U.S. Nationals', 97 *AJIL* (2003) 710. For a critique, see Amnesty International, 'International Criminal Court: The unlawful attempt by the Security Council to give U.S. citizens permanent impunity from international justice', 1 May 2003, AI Index IOR 40/006/2003, available at http://www.amnesty.org (visited 1 March 2004); for a critical analysis of Res. 1422, see Stahn, 'The Ambiguities of Security Council Resolution 1422', 14 *EJIL* (2003) 85.

68 *American Servicemembers Protection Act*, Pub. L. No. 107–206, §§ 2001–2015, 116 Stat. 820 (2002), 22 USCA §§ 7421–7433 (West Supp. 2002).

69 See, e.g., the letter by Paul V. Kelley, Assistant Secretary of State for Legislative Affairs, to Senator Jesse Helms (R-N.C.), 25 September 2001, copy on file with author.

70 For a particularly strong expression of this view, see Rosenthal, 'A Lawless Global Court. How the International Criminal Court undermines the U.N. system,' 123 *Policy Review* (Feb.-Mar. 2004), available at http://www.policyreview.org (visited 1 March 2004). For the alleged lack of democratic checks and balances, see Stephan, 'US Constitutionalism and International Law: What the Multilateralist Move Leaves Out,' 2 *Journal of International Criminal Justice* (2004) 11.

71 18 U.S.C. §3181 (b) excludes nationals from extradition to a country without an extradition treaty, however. In addition, the US usually does not extradite its nationals to countries which do not extradite theirs, see Bassiouni, 2 *International Criminal Law* (1986) 416.

Americans, democratic control of courts is essential, and democracy is exactly what is lacking internationally, regardless of all the safeguards against a 'runaway prosecutor' contained in the ICC treaty. The idea of a jury trial by one's peers and not by an anonymous legal bureaucracy is deeply entrenched not only in the US constitution,[72] but also in the hearts and minds of many Americans. Concern regarding the international supervision of US troops fighting in distant places like Afghanistan and Iraq also plays an important role.

Of course, the US has not admitted similar arguments emanating from other countries regarding the International Criminal Tribunals established by the UN Security Council. But American opposition to an International Criminal Court is also based on concerns for democracy and the separation of powers. As long as international courts and tribunals regulate mutual and reciprocal relations among nation-states, they are accepted — with exceptions — as a necessary evil. But international institutions issuing rulings that are directly applicable to American citizens will remain anathema.

3 Democracy, the Separation of Powers, and Domestic Implementation

To exemplify this point further, we turn now to the implementation of international decisions by the three branches of the federal government, as well as the federal states. An issue that has recently taken centre stage is the willingness of the US domestic legal system to implement international judgments. In the *Breard* and *LaGrand* cases, the non-observance of provisional measures led to an ICJ judgment finally determining that the provisional measures of the Court are binding.[73] This has not helped the implementation of the other parts of the *LaGrand* judgment very much, in the sense that Article 36 of the Vienna Convention on Consular Relations contains individual rights to consular information.[74] The subsequent condemnation of the continued US practice in the *Avena* case was the almost logical consequence.[75]

At the same time, the US Congress is making slow, but considerable progress in conforming US legislation with the WTO ruling on Foreign Sales Corporations. In addition, it appears increasingly likely that the Senate will give its advice and consent, in the near future, to US ratification of the United Nations Convention on the Law of

[72] The right to a jury trial is enshrined in the Fifth Amendment to the US Constitution, allowing only for exceptions in times of war or public danger. Cf. *Blakely v Washington*, No. 02–1632 slip op. at 17 (U.S. 24 June 2004) (Scalia, J.): 'There is not one shred of doubt . . . about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.' A divided Supreme Court has recently extended the scope of the right, see *ibid.* and *Apprendi v New Jersey*, 530 U.S. 466 (2000); *Ring v Arizona*, 536 U.S. 584 (2002).

[73] *LaGrand (Germany v US)*, Judgment, 27 June 2001, at 466, para. 128 count 5.

[74] *LaGrand*, *supra* note 73, para. 128 counts 3, 4, 7.

[75] See *supra* note 7.

the Sea, a convention that contains binding arbitration or adjudication and, even more importantly, empowers the International Tribunal for the Law of the Sea to issue binding provisional measures without the specific consent of a state party.[76] What does this tell us about the ability — and willingness — of the US to fulfil its international obligations?

Some have suggested that US democracy was necessarily opposed to an international legal order based on abstract and universal principles implemented by unelected judges.[77] On the other hand, as Anne-Marie Slaughter has pointed out,[78] the separation of powers, including the power of judges to defend individual rights against the tyranny of the majority, is a feature which is shared by all Western democracies. Thus, an appraisal of the US position towards international adjudication, requires more than a simple analysis of the positions taken by the US Government externally. Rather, we need to examine all branches of government and the federal states.

A *The Executive Branch: Compliance or Defiance?*

For some, there is no doubt that the President has the duty to implement international law. In the words of Louis Henkin, '[u]nder the Constitution, the President, as the national Executive and under his Foreign Affairs authority, has the power and the duty to carry out US obligations under international law. In respect of international law as the law of the land, the President is bound to take care that "the laws be faithfully executed"'.[79] Nevertheless, Henkin also asserts that the President has the power — but not the right — to violate international law.[80] And according to Justice Sutherland's much-cited,[81] even if probably flawed,[82] opinion in *Curtiss-Wright*, the foreign affairs power of the US, and its President, does not stem from the Constitution

[76] United Nations Convention on the Law of the Sea, 30 April 1982, UNTS 1833, at 3, Arts. 287, 288, 290, para. 5, 292; but see also *ibid*, Arts 297, 298 (allowing for exceptions).

[77] See Rubenfeld, 'The Two World Orders', 27 *Wilson Quarterly* (2003) 22. Concerning the 'countermajoritarian difficulty', see also the debate between Alford, 'Misusing International Sources to Interpret the Constitution', 98 *AJIL* (2004) 57, at 58–61; *Ibid.*, 'Federal Courts, International Tribunals, and the Continuum of Deference', 43 *Virginia JIL* (2003) 675; and Koh, 'International Law as Part of Our Law', 89 *AJIL* (2004) 43, at 55.

[78] See Slaughter, 'A Dangerous Myth', 95 *Prospect* (February 2004), available at http://www.prospect-magazine.co.uk (visited 23 March 2004); Slaughter, Rubenfeld & Zakaria, 'Debate: Is International Law a Threat to Democracy?', Council on Foreign Relations, 27 February 2004, available at http://www.cfr.org (visited 23 March 2004).

[79] L. Henkin, *Foreign Affairs and the US Constitution* (2nd. ed., 1996), at 237. See Article II, Sect. 3 of the Constitution of the US. Cf. Charney, 'The Power of the Executive Branch of the United States Government to Violate Customary International Law', 80 *AJIL* (1986) 913; Henkin, 'The President and International Law', 80 *AJIL* (1986) 930; Glennon, 'May the President Violate Customary International Law?: Can the President Do No Wrong?', 80 *AJIL* (1986) 923.

[80] Henkin, *Foreign Affairs and the Constitution*, *supra* note 79, at 236.

[81] For a recent example, see Brook, 'Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, too', 37 *U. Mich. J. L. Reform* (2004) 573, at 580–581, with further references.

[82] See Weisburd, 'International Courts and American Courts', 21 *Mich. J. Int'l L.* (2000) 877, at 916.

(only), but has been 'inherited' from the prerogatives of the Crown.[83] It remains questionable, however, whether this creates any competencies within the US for the execution of international judgments. Some have made imaginative suggestions as to how the President could pressure the other branches of government, and the states, into compliance,[84] but none of them have been attempted so far.

Rather, regarding consular information, the executive branch has created a federal programme to enhance the awareness of the requirement to inform foreign detainees about their right to consular information.[85] The President has remained silent on this issue, but, in some cases, the State Department has intervened to convince governors to postpone an execution, a move which has sometimes, though not always, been effective.[86] Nevertheless, the puzzlement of the US Government that an international court could order changes in domestic criminal proceedings is considerable.[87] The US Counter-Memorial in *Avena* asserts that the Court lacks competence to annul decisions of national courts — without addressing the question, though, of why the legislature and the executive branches have not been able to achieve compliance.[88] The State Department has failed to recant earlier statements that the Vienna Convention on Consular Relations does not provide for individual rights before US Courts, in spite of a contrary interpretation by the ICJ.[89] Neither has it urged the Courts to construe US law in accordance with the international obligations of the US.[90]

Other departments have openly defied pronouncements of international courts. In particular, the Solicitor General, the legal representative of the executive branch before the Supreme Court, has forcefully argued that provisional measures were not

[83] *US v Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936): 'In this vast external realm . . . the President alone has the power to speak or listen as a representative of the nation.' 299 U.S. 304 (1936), at 319.

[84] See, e.g., Vazquez, 'Breard and the Federal Power to Require Compliance with I.C.J. Orders of Provisional Measures', 92 *AJIL* (1998) 683; sceptical Brook, *supra* note 81, at 591 (rejection by Courts probable); contra Weisburd, *supra* note 82, at 928–929 (no self-executing character).

[85] The ICJ has recognized this effort, see *LaGrand*, *supra* note 4, paras. 123–24 and 128 count 6. See also Department of State, Consular Notification and Access, available at http://www.travel.state.gov/consul_notify.html (visited 1 March 2004), which also emphasizes the self-executing character of Article 36 VCCR.

[86] For examples before the ICJ judgment in *LaGrand*, see *supra* note 48.

[87] See *Avena*, Counter-Memorial of the United States of America, 3 November 2003, available at http://www.icj-cij.org (visited 1 March 2004), para. 8.6: 'The remedy provided by the Court in *LaGrand* is thus a far-reaching and unprecedented one. Its effects reach the very heart of the State's responsibility to its citizens to maintain public order. Moreover . . . the Court departed from the particular facts before it . . . to create, for the first time, a remedy of general and prospective application.'

[88] *Ibid.*, para. 8.23.

[89] See, *e.g.*, Letter from State Department to James K. Robinson, Assistant Attorney General, U.S. Department of Justice 1 (15 October1999), available at http://www.state.gov/documents/organization/7111.doc (visited 1 March 2004).

[90] On the importance of executive statements for the interpretation of international treaties, see *infra* note 133 and accompanying text; on the *Charming Betsy* canon, see *infra* note 131.

binding or even persuasive for the courts of the federal states.[91] In a recent filing, the Solicitor General added that 'the I.C.J. does not exercise any judicial power of the United States, which is vested exclusively by the Constitution in the United States federal courts'.[92] Justice Breyer's comment is telling: 'While this is undeniably correct as a general matter, it fails to address the question whether the I.C.J. has been granted the authority, by means of treaties to which the United States is a party, to interpret the rights conferred by the Vienna Convention.'[93]

During the administration of George W. Bush, the State Department has pointedly refused to take a stand on the effect of the Vienna Convention, pointing out that 'the Department of State … has taken no position on whether the petition should be granted, but we are passing along requests from Mexico concerning this case to the State of Texas authorities.… We have asked Texas authorities to give specific attention to the consular notification issue'.[94] Nevertheless, the State Department has so far avoided openly defying the ICJ, attempting to reach greater compliance by persuasion than by legal means. It has, however, not taken any political risks, such as proposing amendments of US laws to conform with the ICJ *LaGrand* judgment, or statements to US Courts recommending the judicial implementation of ICJ judgments.

Concerning dispute settlement under the WTO, the executive branch has grudgingly used its power to abolish the steel tariffs deemed illegal by the DSB.[95] On 1 March 2004, the European Union imposed sanctions against the US for failing to adapt its privileges for Foreign Sales Corporations to the rulings of the WTO Appellate Body.[96] The President urged Congress to implement the ruling.[97] In trade matters, the executive branch thus appears to be much more ready to incur risks in its relationship with Congress. Two reasons may be advanced: on the one hand, trade has a domestic constituency in the businesses most affected by trade sanctions; on the other, where legislation is required, the President can easily 'wash his hands in innocence', arguing before US trading partners that Congress prevented the US from acting on DSB rulings.

[91] See *supra* note 48. This statement has played a considerable role in the rejection of the request by Secretary of State Albright to stay the execution of Breard pending a final decision by the International Court of Justice by the Governor of Virginia, see *infra* note 163 and accompanying text.

[92] *U.S. v Ortiz*, 315 F.3d 873, *cert. denied*, 124 S.Ct. 920 (2003), brief in opposition, cited in *Torres v Mullin*, 124 S.Ct. 562 (Mem), 540 U.S. —— (2003) (Breyer, J., dissenting).

[93] *Torres v Mullin*, *ibid.*

[94] U.S. Department of State, Daily Press Briefing, Washington, DC, 13 August 2000, at 10, available at http://www.state.gov/r/pa/prs/dpb/2002/12644.htm (visited 1 March 2004). The whole exchange is quite revealing of the influence, or lack thereof, the Department exercises on state non-compliance with the Convention.

[95] See *supra* note 63 and accompanying text.

[96] See BBC, 'EU opens new front in trade war', available at http://news.bbc.co.uk/2/hi/business/3521731.stm (visited 1 March 2004).

[97] Statement by the President, 1 March 2004, available at http://www.whitehouse.gov (visited 1 March 2004).

B *The Legislative Branch: Neglect or Defiance?*

In an international community in which international rules and regulations increasingly reach into the domestic legal order, the executive is not the only branch of government dealing with the implementation of international law. Historically, the legislative branch has always been the least amenable to international pressures. Since the (in)famous debates over the Bricker Amendment in the 1950s,[98] strong forces in the US legislature have sought to limit the domestic effect of the international obligations of the US. As Louis Henkin put it, 'Senator Bricker lost the constitutional battle but perhaps not his political war.'[99] The US Senate has made the non-self-executing character of human rights treaties a precondition for their ratification.[100] As to the ICJ, since the withdrawal of the US acceptance of the optional clause, the Senate has not given its advice and consent to treaties providing for the binding interpretation of the ICJ without a respective US reservation.[101] In the *Nicaragua* case, Congress openly supported the administration by allotting funds to the Contras,[102] two days before the Court came to the conclusion that the US had violated international law by doing so and that it was 'under a duty immediately to cease and to refrain from all such acts'.[103] Thus, at least in the area of international peace and security, there is little evidence that Congress would be willing to follow international rulings if considered adverse to the US.

Congress remains extremely reluctant to modify US law to meet international obligations or international judicial decisions. Congress did nothing to change the respective provision of the Antiterrorism and Effective Death Penalty Act[104] after the final *LaGrand* decision. It is indicative of congressional attitudes that a state like

[98] The Bricker Amendment intended to take away the direct effect of self-executing treaties in the US ('A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty.'), see L. Henkin, *Foreign Affairs*, *supra* note 79, at 192–193. For an extensive historical account, see D. Tananbaum, *The Bricker Amendment Controversy* (1988).

[99] Henkin, *ibid.*, at 193.

[100] See U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Elimination of All Forms of Racial Discrimination, 103d Cong., 2d Sess., 140 Cong. Rec. S7634 (daily ed. 24 June 1994); U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 102d Cong., 2d Sess., 138 Cong. Rec. S4783 (daily ed. 2 April 1992); US Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong., 2d Sess., 136 Cong. Rec. S17491 (daily ed. 27 October 1990); Protocols to the Convention on the Rights of the Child, 148 Cong. Rec. S5718–19 (daily ed. 18 June 2002).

[101] See *supra* note 38 and accompanying text.

[102] Military Construction Appropriations Act for Fiscal Year 1987, Pub.L. No. 99–500, § 101 (k), 100 Stat.1783 (1986). For more detail, see Schulte, *supra* note 28, at 197.

[103] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, ICJ Reports (1986), 19, at 149. For the judicial evaluation of this act by the D.C. Circuit Court see *infra*, note 114 and accompanying text.

[104] Antiterrorism and Effective Death Penalty Act of 1996, 24 April 1996, Public Law No. 104–132, 110 Stat. 1214 (1996), 28 U.S.C. § 2254(a), (e)(2)(ii) (2004).

California was more ready to act than the federal legislature.[105] The growing hostility of parts of Congress towards international judicial institutions came recently to the fore when 50 members of the House introduced a resolution asking courts to cease to refer to foreign adjudicatory bodies.[106]

As to the WTO Dispute Settlement Body, Congress has expressly denied its decisions any binding effect within the domestic legal order.[107] In addition, the federal government is not only obliged to consult extensively with the states, but is also barred from using DSB decisions to bring action against the states for not implementing the WTO treaty.[108] It should be noted, however, that hardly any other WTO Member has accorded direct effect to the Treaty.[109] Congress is extremely slow to implement DSB decisions. In the first attempt to implement the Foreign Sales Corporations decision, the US FSC Replacement and Extraterritorial Income Exclusion Act (ETI Act)[110] was regarded by the DSB as entirely insufficient to meet WTO requirements.[111] In spite of some difficulty in an election year, both houses of Congress have, however, recently passed acts implementing the latest DSB ruling on the matter with an overwhelming bipartisan majority.[112] The debate centred on domestic issues rather than the implementation of the DSB ruling. Due to domestic issues such as

[105] See the example of California, 'implementing' the existing US treaty obligation, which was self-executing. See Communication of the Californian Attorney-General, 13 September 2000, see *LaGrand (Germany v US)*, Oral Pleadings (Germany), 13 November 2000, CR 2000/23, para. 10 (Simma): 'California Penal Code section 834c which implements the Vienna Convention in California, did not take effect until January 1, 2000. Therefore, that provision of law and its mandate to California law enforcement officials did not apply in January 1999 when you suggest Mr. Mardis was arrested.' This statement ignores the treaty clause of the US Constitution, Art. VI. See Cal. Penal Code § 834c(a)(1) (2000); see also Florida Stat. ch. 288.816(2)(f)(2001).

[106] Draft H. Res. 568, 108th Congress, 2d Session, 17 March 2004, available at http://www.house.gov (visited 26 March 2004). On 25 March, the House Subcommittee on the Constitution has held hearings on this resolution, see http://www.house.gov/judiciary/constitution.htm (visited 26 March 2004).

[107] See 19 U.S.C.A. § 3512 (West 2003), (a) (1): 'No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.'

[108] *Id.*, (b) (1) [consultation], (2) [legal challenge of state law].

[109] For the European Union, see Case C–149/196, *Portugal v Council*, [1999] ECR I–8395; see also Berkey, 'The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting', 9 *EJIL* (1998) 626; Eekhout, 'Judicial Enforcement of WTO Law in the European Union — Some Further Reflections', 5 *JIEL* (2002) 91, with further references. But see Case C–93/02, *Biret Int. Sa v Council*, judgment of 30 September 2003 (considering the possibility of compensation for private businesses).

[110] Pub. L. 106–519, 114 Stat. 2423 (2000).

[111] See the rejection of the resulting legislation by the DSB, *US — Tax Treatment for 'Foreign Sales Corporations', Recourse to Article 21.5 of the DSU by the European Communities*, Report of the Appellate Body, 14 January 2002, WTO Doc. WT/DS108/AB/RW, available at http://www.wto.org (visited 1 March 2004).

[112] The Senate has approved the Act with the misleading title 'Jumpstart Our Business Strength (JOBS) Act', S. 1637, 108th Cong., Cong. Rec., S5218 (daily ed., 11 May 2004), the House with the title 'American Jobs Creation Act of 2004', H.R. 4520, 108th Cong. (2004), Congr. Rec. H4433 (daily ed., 18 June 2004).

tobacco subsidies, it remains to be seen, however, whether both houses can agree on a common version of the bill.[113]

Thus, it is only when international adjudication affects a domestic economic audience that Congress will sooner or later be willing to act. It is difficult to say, however, whether this behaviour is the result of neglect or defiance. It may well be a mixture of both.

C *The Judicial Branch: Between Compliance and Defiance*

Implementation of international judgments in the US is even more difficult when the US government itself regards a judgment not only as mistaken, but as *ultra vires* and thus not binding. This is of course what happened in the *Nicaragua* case. Can individuals force the hands of the President to implement international law? The only relevant Supreme Court case concerns provisional measures. But the case of *Committee of U.S. Citizens Living in Nicaragua v Reagan*[114] before the most prestigious D.C. Circuit Court suggests that international judgments will not be implemented by US domestic courts when the executive and legislative branches are not willing to do so.

The Court based its decision primarily on the lack of enforceability of the decision by private parties. In the opinion of the Court,

> [n]either individuals nor organizations have a cause of action in an American court to enforce ICJ judgments. The ICJ is a creation of national governments, working through the U.N.; its decisions operate between and among such governments and are not enforceable by individuals having no relation to the claim that the ICJ has adjudicated. . . . The United States' contravention of an ICJ judgment may well violate principles of international law. But . . . those violations are no more subject to challenge by private parties in this court than is the underlying contravention of the ICJ judgment.[115]

And further: 'Article 94 of the UN Charter [e.g. the duty to comply with ICJ decisions] simply does not confer rights on private individuals.'[116]

The D.C. Circuit Court did not apply the political question doctrine as such, but regarded the implementation of international judgments as part of foreign policy that should be left to the other branches of government, and contemplated an exception to this rule, if any, only for peremptory norms.[117] By overriding the obligations of the US under the Charter through its legislation funding the Contras, Congress benefited from the *lex posterior* rule, the appropriations being later-in-time than Article 94, para. 1, of the Charter. As to a customary law duty to obey the rulings of an international court to which a state has submitted itself, the Court emphasized that 'no enactment of Congress can be challenged on the ground that it violates customary

[113] See Andrews, 'Tobacco Buyout May Imperil Corporate Tax Bill', *New York Times*, 17 June 2004, at C1.
[114] 856 F.2d 929 (D.C. Cir. 1988) [hereinafter *CUCLIN*].
[115] *CUCLIN*, at 934.
[116] *CUCLIN*, at 937.
[117] *CUCLIN*, at 933–935. Cf. *Baker v Carr*, *supra* note 31.

international law'.[118] The most striking feature of the judgment is probably its discussion of *jus cogens*. The court distinguished between substantive rules — such as the prohibition on the use of force — and the ICJ judgment. The former may be *jus cogens*, the judgment itself is not.[119] The Circuit Court also rejected the application of 'offensive collateral estoppel', i.e., a bar against the government from rearguing a claim it already lost before another court.[120]

It would be difficult to argue with the Court on these points. However, the Circuit Court apparently failed to contemplate deferring to a binding, or at least persuasive, interpretation of certain rules by the ICJ. It also rejected claims to use a domestic cause of action as a vehicle to introduce ICJ judgments into the domestic legal order, arguing that the judgment only operates between governments.[121] The *CUCLIN* case confirms that ICJ judgments, operating between states, can seldom, if ever, be enforced through US courts.

However, the real test occurs when the ICJ itself requires domestic law to provide a course of action to individuals. This is exactly what happened in the cases dealing with the implementation, or lack thereof, of Article 36 of the Vienna Convention on Consular Relations, namely *Breard*, *LaGrand* and *Avena*. In this series of cases, the respective Paraguayan, German and Mexican nationals were arrested and sentenced to death without having received consular information as required by the 1964 Vienna Convention.[122] If this failure is not raised in the jury trial — which is impossible if the information is still lacking and the (often court-assigned) attorney is not aware of the right — raising the matter on appeal is barred by the procedural default rules under both state and federal law, in the latter case not only by way of the standing jurisprudence of the Supreme Court,[123] but also by the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).[124]

While the US courts and the US states denied the claim by the defendants that the lack of consular notification vitiated their convictions,[125] the ICJ granted provisional

[118] *CUCLIN*, at 939. See also *The Paquete Habana*, 175 US 677, 20 S.Ct. 920 (1900), in which the famous statement that 'international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction' is qualified by the statement that only if 'there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of nations.' See also, to the same effect, *The Nereide*, 13 US (9 Cranch) 388 (1815), at 432 (per Marshall, C.J.).

[119] *CUCLIN*, at 939–942.

[120] See *US v Mendoza*, 464 US 154, at 159 n. 4 (1984). The decision denied the use of offensive collateral estoppel against the US as a party in a domestic context.

[121] *CUCLIN*, at 943–945.

[122] See *Vienna Convention on Consular Relations (Paraguay v US)*, Provisional Measures, Order of 9 April 1998, ICJ Reports (1998), 248; discontinued after the execution of Breard, see Order of 10 November 1998, ICJ Reports (1998), at 426; *LaGrand*, *supra* note 4; *Avena*, *supra* notes 3 and 7.

[123] See only *Picard v Connor*, 404 U.S. 270, 275 (1971); *Murray v Carrier*, 477 U.S. 478, 488 f. (1986).

[124] Pub.L. No. 104–132, 110 Stat. 1214 (1996).

[125] See, e.g., *Breard v Greene*, 523 U.S. 371, 118 S.Ct. 1352, 1355 (1998); *Germany v US*, 119 S.Ct. 1016 (1999); *LaGrand v Stewart*, 170 F.3d 1158 (9th Cir. 1999). For a comprehensive presentation of the Mexican cases, see the statements of facts by the parties, available at http://www.icj-cij.org (visited 1 March 2004).

measures against the pending execution of Breard, the surviving LaGrand brother and several Mexican citizens.[126] In spite of these repeated interventions by the ICJ, Breard and the surviving LaGrand brother were executed. By a majority of 7 to 2, the Supreme Court decided that the US was not only not bound by the provisional measures indicated by the ICJ, but that Congress had overruled any conceivable violation of the Vienna Convention by the adoption of the AEDPA. The Court fails to even attempt to apply the *Charming Betsy* principle to the effect that it may not have been the intent of Congress when adopting the AEDPA to deny rights enshrined in international treaties. Thus, the claim that courts 'should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]'[127] amounted, in practice, to an exercise in inconsequential politeness.

This decision is far removed from the respect other courts have previously paid to international decisions. The most famous example, regarding the access of the PLO to the United Nations, reads as if it came from another age.[128] New York District Judge Palmeri did not apply the Advisory Opinion of the ICJ on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* of 26 June 1947[129] as such.[130] And yet, he applied the *Charming Betsy* canon of interpretation[131] and construed the domestic Anti-Terrorism Act as not abrogating the Headquarters Agreement, because it did not explicitly say so: '[N]o member of Congress, at any point, explicitly stated that the ATA was intended to override any international obligation of the US'.[132] If this standard had been applied in *Breard* and *LaGrand*, the AEDPA could not have been regarded as overruling the right to consular information under the Vienna Convention.

Not all justices agree with the majority of the Court. Justice Breyer's statement cited at the beginning of this article speaks another language. In *Breard* and *Germany v US*, two justices merely relied on the statement of the executive branch, others wanted

[126] *Vienna Convention on Consular Relations (Paraguay v US)*, Provisional Measures, ICJ Reports (1998), 248; *LaGrand (Germany v US)*, ICJ Reports (1999), 9; *Avena (Mexico v US)*, Provisional Measures, 5 February 2003, available at http://www.icj-cij.org (visited 1 March 2004).

[127] *Breard v Greene*, 523 U.S. 371, 375 (1998).

[128] *U.S. v Palestine Liberation Organization*, 695 F.Supp. 1456, 1464–71 (S.D.N.Y.1988); see also *Klinghoffer v S.N.C. Achille Lauro Ed Altri-Gestione Motonave*, 937 F.2d 44 (2nd Cir. 1991).

[129] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, Advisory Opinion of 26 April 1988, ICJ Reports (1988), 12.

[130] *U.S. v PLO*, *supra* note 128, at 1462.

[131] *Murray v The Charming Betsy*, 6 US (2 Cranch) 64, 118, [2 L.Ed. 208] (1804). Cf. O'Connor, 'Keynote Address', 96 *ASIL Proc.* (2002) 348, at 350: 'I can think of only two cases during my now more than 20 years on the Court that have relied upon this interpretive principle.' (referring to *Weinberger v Rossi*, 456 U.S. 25, 32 (1982) and *Trans World Airlines v Franklin Mint*, 466 U.S. 243, 252 (1984)); cf. Vagts, 'Taking Treaties Less Seriously', 92 *AJIL* (1998) 458, at 459. But see the recent confirmation of the rule in *F. Hoffman-La Roche Ltd. v Empagran S.A.*, 14 June 2004, No. 03–724 (slip op., at 7). For a repudiation of *Charming Betsy* by a Court of Appeals, see *Sampson v Federal Republic of Germany*, 250 F.3d 1145, 1151 (7th Cir. 2001).

[132] *U.S. v PLO*, *supra* note 128, at 1470.

more time to examine the opinion of the ICJ more deeply.[133] In the subsequent *Torres* case, one of these two justices, Justice Breyer, dissented to the denial of certiorari,[134] and Justice Stevens 'upgraded' his formal dissent of the time into a substantive one, arguing that '[a]pplying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair'.[135] These voices have remained in the minority, though.[136] The majority of the Supreme Court seemed to be so unconcerned with the result of *Avena* that it denied certiorari in the *Torres* case without even offering a rationale.

It is not surprising, then, that lower courts have almost completely ignored, or at least not implemented, the *LaGrand* judgment.[137] Only in a few cases have lower courts actually vacated a judgment tainted by non-information on consular rights, and the reasoning indicates that the violation of the Vienna Convention constituted only one (probably the least important) reason, the ratio for vacating the judgment lying in the ineffective assistance of counsel.[138] Only in one case did a US District Court explicitly apply the *LaGrand* reasoning.[139] Only one Ohio Supreme Court justice found the violation important enough to vacate a respective judgment.[140] More promising was the judgment of a US District Court in New York which granted damages for

[133] See *supra* note 126.

[134] *Torres, supra* note 1 (Breyer, J., dissenting).

[135] *Torres, supra* note 1 (Opinion of Stevens, J.).

[136] See *Breard v Greene*, 118 S.Ct. 1352, 1355 (1998).

[137] For examples of a complete disregard of the ICJ decision and concomitant denial of individual rights, see *US v Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 1450 (2002); *US v Minjares-Alvarez*, 264 F.3d 980, 986–987 (10th Cir. 2001); *Ex parte Suarez Medina*, No. 37,792–02, slip op. at 2 (Tex. Crim. App. 2002). For a decision denying any effect of the ICJ decision, see *Bell v Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002): '[W]e conclude that the ICJ [in *LaGrand*]... did not hold that Article 36 of the Vienna Convention creates legally enforceable individual rights that a defendant may assert in a state criminal proceeding to reverse a conviction.' See also Cassel, 'International Remedies in National Criminal Cases: ICJ judgment in Germany v United States,' 15 *Leiden JIL* (2002) 69, at 78–81; Quigley, 'LaGrand: A Challenge to the U.S. Judiciary', 27 *Yale J. Int'l L.* (2002) 435; Ray, 'Domesticating Interantional Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations', 91 *California LR* (2003) 1729, 1753–57.

[138] The state cases are *Valdez v Oklahoma*, OK CR 20, 46 P.3d 703 (2002), on this case, see Green, 'Valdez v State of Oklahoma and the Application of International Law in Oklahoma', 56 *Okla. L. Rev.* (2003) 499; *Ledezma v State*, 626 N.W.2d 134 (Iowa 2001); the federal case is *People v Madej*, 739 N.E.2d 423 (Ill. 2000). All three decisions ultimately relied on ineffective assistance of counsel rather than a violation of the VCCR.

[139] *U.S. ex rel. Madej v Schomig*, 223 F.Supp.2d 968 (N.D.Ill. 2002): '[T]he I.C.J. ruling conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights ... It also suggests that courts cannot rely upon procedural default rules to circumvent a review of Vienna Convention claims on the merits.' Confirmed in *U.S. v Schomig*, 2002 WL 31386480 (N.D.Ill.): 'This interpretation of the Convention [by the ICJ] is binding upon the United States and this Court as a matter of federal law due to the ratification of the Optional Protocol.' For a case in which 'review and reconsideration' arguably met the *LaGrand* standard, see *Ortiz, supra* note 92.

[140] *Ohio v Issa*, 93 Ohio St.3d 49, 56, 752 N.E.2d 904, 915 (Supreme Court of Ohio 2001), applying the procedural default rule except in cases of 'plain error', that is 'but for the error, the outcome of the trial would clearly have been otherwise', relying on *Breard v Greene, supra* note 125, and completely ignoring *LaGrand, supra* note 4; but see *Issa*, 93 Ohio St.3d, at 78 *et seq.*, 752 N.E.2d, at 933 *et seq.* (Lundberg Stratton, J., dissenting).

unlawful arrest in connection with a violation of the Vienna Convention,[141] but the case has remained an exception.

On the other hand, it remains to be noted that the US has so far not executed any of the individuals mentioned in the Provisional Measures pronounced by the Court on 5 February 2003[142] and has thus abided by the order of the Court, differing from its behaviour in the *Breard* and *LaGrand* cases. Due to the attitude of its courts, the US, in the *Avena* proceedings, saw a better prospect for the implementation of the judgment in clemency rather than as a matter of right,[143] despite the fact that the Supreme Court regards clemency as an extra-judicial, purely political process.[144] It did not come as a surprise that the ICJ rejected such review based on grace rather than on judicial proceedings.[145] It remains to be seen whether the US will implement this judgment, which seems to require, at a minimum, the non-application of the procedural default rule to 48 cases in the judicial proceedings still under way, and a judicial review and reconsideration in the three cases in which the usual remedies are exhausted, as well as a general modification of the application of the procedural default rule to the right to consular information.[146]

It is one thing to reject a claim that judgments of the ICJ are directly applicable in domestic law,[147] and quite another to more or less ignore the jurisprudence of the 'principal judicial organ of the United Nations' in the interpretation and application of international law. Thus, the criticism of the Supreme Court in *Breard, LaGrand*, and *Torres* should be directed less against the denial of a self-executing character of ICJ decisions, but to the refusal to exhaust the existing avenues of domestic law to achieve compliance.

Arguably, however, a change of attitude is in sight, *pace* the *Torres* decision of the US Supreme Court, which, because of the lack of reasoning, may not be the final word on the implementation of the *LaGrand-Avena* jurisprudence. In the *Atkins* and *Lawrence* decisions, the US Supreme Court has recently taken account of the opinion of

[141] *Standt v City of New York*, 153 F.Supp. 2d 417 (S.D.N.Y. 2001).

[142] See *supra* note 51 and accompanying text.

[143] See *Avena*, US Counter-Memorial, *supra* note 87, at paras. 6.67 *et seq.* For a devastating account of clemency hearings in Texas, see *Faulder v Texas Board of Pardons and Paroles, et al.*, No. A-98-CA-801, slip op. at 16, cited in Memorial of Mexico, *supra* note 48, para. 267.

[144] *Ohio Adult Parole Authority v Woodard*, 523 U.S. 272, 276, 284 118 S.Ct. 1244, 1247, 1251–2 (1998) (Rehnquist, C.J., plurality op., denying due process rights in clemency proceedings); *Connecticut Bd. of Pardons v Dumschat*, 452 U.S. 458, 464, 101 S.Ct. 2460, 2464 (1981). 'A death row inmate's petition for clemency is also a "unilateral hope." The defendant in effect accepts the finality of the death sentence for purposes of *adjudication*, and appeals for clemency as a matter of *grace*.' (*Woodard*, 523 U.S. at 282, 118 S.Ct. at 1252, plurality op.).

[145] *Avena*, *supra* note 7, paras. 138–141 referred to in the dispositif, see *ibid.*, para. 153 (9), (11).

[146] *Ibid.*, paras. 113–114.

[147] Cf. Weisburd, 'International Courts and American Courts', 21 *Michigan JIL* (2000) 877, at 882–891; Bradley, *supra* note 100, at 1560.

international courts and tribunals,[148] and it has just confirmed the ongoing validity of the *Charming Betsy* canon by unanimously narrowing the extra-territorial jurisdiction of US Courts for foreign anti-competitive conduct.[149] Even Justice Scalia, known for his ferocious opposition to the use of contemporary foreign judgments by the Supreme Court for the interpretation of the US Constitution — except in cases of treaty interpretation and for showing that a particular legal outcome did not result in a disastrous outcome in other jurisdictions — has recently distinguished foreign judgments from those pronounced by an international judicial tribunal in the exercise of its jurisdiction, espousing a 'deferential' attitude to the latter.[150]

Lower courts have sent mixed signals. The 11th Circuit Court has referred to opinions by the ICTY and to the ICC Statute, in spite of non-ratification of the latter by the US.[151] In another recent case, the D.C. District Court has upheld the Algiers Accords, which solved the Hostage Crisis of 1980, in spite of dubious attempts by Congress to overrule them. It thus protected the results of 20 years of jurisprudence by the Iran-US Claims Tribunal.[152] The Oklahoma Court of Criminal Appeals, by a 3 to 2 majority, sent the *Torres* case back to a lower court to evaluate the influence of the violation of the Vienna Convention on Consular Relations on his conviction and sentence.[153] The concurrent opinion by Judge Chapel also referred to *Avena*. The federal 5th Circuit Court was less moved by the ICJ, however.[154] It remains to be seen whether these cases portend a more deferential attitude by US courts towards international law in general and international adjudication in particular.

148 See *Atkins v Virginia*, 536 U.S. 304, 316 n. 21, 122 S.Ct. 2242, 2249 (2002) (referring to the disapproval of the world community of the execution of the mentally retarded); *Lawrence v Texas*, 123 S.Ct. 2473 (2003), at 2481, 2483 (citing ECHR case law); but see also *Atkins*, 536 U.S. at 321, 325, 122 S.Ct. at 2252, 2254 (Rehnquist, C.J., dissenting) and 536 U.S. at 337 (Scalia, J., dissenting) ('Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people.'). Similarly *Lawrence*, 123 S. Ct. at 2488, 2495 (Scalia, J., dissenting).

149 *F. Hoffmann-La Roche Ltd. v Empagran S.A.*, No. 03–724, , slip op. at 7 (U.S. 14 June 2004). But see *Hartford Fire Ins Co. v California*, 509 U.S. 764, 794, 113 S.Ct. 2891, 2908 (1993).

150 Scalia, 'Keynote Address', American Society of International Law, 98th meeting, 2 April 2004, response to a question by Douglass Cassell, notes of the author.

151 See, *e.g.*, *Ford v Garcia*, 289 F.3d 1283 (11th Cir. 2002), at 1290–93.

152 See *Roeder v Iran*, 333 F.3d 228 (D.C. Cir. 2003), *rehearing den.* Nov. 7, 2003, *cert. denied*, 24 June 2004, 2004 WL 263920 (applying the Supreme Court finding in *Dames & Moore v Regan*, 453 U.S. 654, 101 S.Ct. 2972, in spite of attempted Congressional interference). For a critical comment see Note, 'D.C. Circuit Holds that an International Agreement bars Former Hostages Suit Against Iran Despite Legislation Aimed at Aiding the Suit', 117 *Harv. L. Rev.* (2003) 743 (arguing that the Circuit Court is too timid in rejecting congressional interference in judicial determination of cases). See also *American Insurance Association v Garamendi*, 123 S.Ct. 2374 (2003), at 2387; *Ibid.*, at 2398–99 (Ginsburg, J., dissenting).

153 *Torres v Oklahoma*, Case No. PCD-04–442 (Okl.Cr. 13 May 2004).

154 *Medellin v Dretke*, 20 May 2004, 2004 WL 1119647 (5th Cir.(Tex.)) (Federal Court of Appeals for the 5th Circuit relying on previous jurisprudence to reject a *habeas corpus* appeal before federal courts).

D *Federalism and International Adjudication*

The so-called 'new federalism'[155] of the Rehnquist court in domestic matters has provoked a discussion on its applicability to international affairs. Whereas the reaction of the US international law establishment to the *Breard* case showed a remarkable unity in the rejection of the Supreme Court's attitude,[156] other writers have regarded the *Breard* and *LaGrand* cases as an opportunity to call for the effective overruling of the primacy of the federal government in foreign affairs. Apparently shocked by the examples of both the European and the Inter-American system of human rights protection, some of these writers regard an international review of state decisions as nothing less than 'a significant erosion, if not indeed . . . destruction, of the states' judicial authority'.[157]

The US Supreme Court has remained largely unmoved, however. In 1920, in *Missouri v Holland*,[158] it had decided that, except for the complete erosion of the authority of the states, the US could enter into treaties with other nations and implement them in its domestic law regardless of the domestic separation of powers between the federal government and the states. In fact, the federal government had concluded the treaty with Canada precisely to circumvent the reluctance of states to protect migratory birds, and in the same way the US Constitutional Convention introduced the treaty clause as part of the supremacy clause into the Constitution in order to make sure that the states finally implemented the peace treaty with Great Britain to avoid confrontation with the superpower of the time.[159] Recent jurisprudence confirms the leading role of the federal government in foreign affairs.[160]

As the *Breard*, *LaGrand*, and *Avena* cases have shown, state-level awareness of the binding nature of international treaties under the Constitution is low. The then-Governor George W. Bush argued that the state of Texas was 'not a signatory to the Vienna Convention on Consular Relations' and thus not bound by it.[161] Even well-meaning states, such as California, introduced implementing legislation, as if

[155] See, in particular, the 'anti-commandeering' decisions of *Printz v United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997); *New York v United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992).

[156] See in particular the agora of the *American Journal of International Law* on the *Breard* case, 'Agora, Breard', 92 *AJIL* (1998) 666; in particular Henkin, 'Provisional Measures, U.S. Treaty Obligations, and the States', 92 *AJIL* (1998) 679; Slaughter, 'Court to Court', 92 *AJIL* (1998) 708 (advocating the application of the Order by way of comity); Vazquez, 'Breard and the Federal Power to Require Compliance with I.C.J. Orders of Provisional Measures', 92 *AJIL* (1998) 683. All three argued for the domestic application of the order on provisional measures, *Vienna Convention on Consular Relations (Paraguay v US)*, ICJ Reports (1998), 248.

[157] Weisburd, *supra* note 147, at 920, footnotes omitted.

[158] *Missouri v Holland*, 252 U.S. 416, 40 S.Ct. 382 (1920). See the 'necessary and proper' clause in the US Constitution, art. 2 § 8.

[159] Cf. *The Federalist*, Nos. 3, 4 (John Jay). See also Bradley and Goldsmith, 'The Abiding Relevance of Federalism to U.S. Foreign Relations', 92 *AJIL* (1998) 675, at 677; Brook, *supra* note 81, at 579–80; Henkin, *Foreign Affairs*, *supra* note 78, at 190; all with further references.

[160] *American Insurance Association v Garamendi*, 123 S.Ct. 2374 (2003).

[161] George W. Bush, National Public Radio, 9 December 1998: 'The State of Texas is not a signatory to the Vienna Convention on Consular Relations.', cited in Brook, *supra* note 81, p. 580.

such legislation were necessary.[162] Asked by Secretary of State Madeleine Albright to stay the execution of Angel Francisco Breard, the Governor of Virginia responded that

> the International Court of Justice has no authority to interfere with our criminal justice system. Indeed, the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice. It is my responsibility and the responsibility of law enforcement and judicial officials throughout the Commonwealth. I cannot cede such responsibility to the International Court of Justice.[163]

Characteristically, the governors did not contemplate any reciprocal interest for US travellers abroad to eventually benefit from the rights under the Vienna Convention on Consular Relations, too.

The ensuing defeat of the US view in the *LaGrand* case seems not to have impressed the states very much. For example, President Bush's successor as Governor of Texas, Rick Perry, is cited as claiming that 'the International Court of Justice does not have jurisdiction in Texas.'[164] Apparently, the reaffirmation of the ICJ's international authority over all state officials[165] has not convinced US state officials, certainly no more than has the treaty clause. The attempt to add 'federal-state clauses' to a great many US international commitments, which in principle exclude the creation of rights and duties for the states,[166] testifies to the rising power of states' rights arguments. In the *Torres* case, however, the Governor of Oklahoma commuted the death sentence to life imprisonment,[167] referring to *Avena*. The Oklahoma Court of Criminal Appeals sent the case back to a lower court.[168]

The argument in favour of extending the 'new federalism' to foreign affairs fails to consider that the US Constitution approves, rather than rejects, US participation in international legal relations. It is, however, quite unfortunate that, in spite of all the arguments for a reading of the Constitution according to its 'original meaning',[169] the 'original meaning' of the supremacy clause — namely that treaties are, as a rule, directly applicable in the US domestic legal order — seems to be frequently

[162] See *supra* note 105. Cf. Remarks in Hearings before the Senate Committee on Foreign Relations, S. Exec. Rep. No. 91–9, 91st Cong. 1st Sess. 2 & 5 (appendix) (1969). The executive branch still holds this view, see 1997 US Briefs 1390, at p. 17 n. 4.

[163] Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (14 April 1998), cited in Charney and Reisman, *supra* note 48, at 674–5.

[164] Simons and Weiner, 'World Court Rules U.S. Should Review 51 Death Sentences', *New York Times*, 1 April 2004, p. A1, at A8.

[165] *LaGrand* (Germany v US), Provisional Measures, 3 March 1999, ICJ Reports (1999), 9, at 16, para. 28: '[T]he Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States'. It is of course debatable whether this is a matter for the ICJ. The competences of the Governor of Arizona are a matter of domestic law. This does not change, however, the binding character of the undertakings of the federation for its constituent states.

[166] See Henkin, *Foreign Affairs*, *supra* note 78, at 190. For a recent example, see the Sale of Children Protocol to the UN Convention on the Rights of the Child, 148 Cong. Rec. S5717 (daily ed., 18 June 2002).

[167] 'Gov. Henry Grants Clemency to Death Row Inmate Torres', 13 May 2004, available at http://www.governor.state.ok.us (visited 21 May 2004).

[168] See *supra* note 153 and accompanying text.

[169] See, in particular, A. Scalia, *A Matter of Interpretation* (1997), at 38.

disregarded.[170] It remains to be seen whether the Supreme Court will, after *Avena*, display the very deference to international courts and tribunals which its jurisprudence otherwise calls for, but which it disregarded both in *Breard* and in *Torres*.

4 Conclusion

What explains the shift in the US attitude to international adjudication from advocacy to scepticism, if not repudiation? One explanation would look to the unique position of the US in the international system. As the only superpower, the US seems to be able to afford to both go it alone and demand of other states to implement global democratic values. From this perspective, the insistence on international law is an indication of weakness.[171] There is some truth in the argument that the early US had to rely much more strongly on international law than today's sole superpower. But this argument cannot explain why the US, after the Second World War, created the very institutions it now seems so loath to respect.

Another explanation refers to the unique democratic experience of the US, which is hostile to foreign judges, even to those in Washington, D.C.[172] By their very nature, international legal institutions are not under the same democratic constraints as elected local judges. Populist democracy and a strong regionalism seem not to be compatible with the transfer of broad powers to unelected international judicial institutions, be it the ICJ, the WTO dispute settlement body, or the ICC. The very reasons why the early republic, until the First World War, was fond of international adjudication and arbitration, namely the introduction of 'American' values into the international system, now turns it against any attempt to introduce a powerful international judiciary. Whereas the founders were clearly concerned with the implementation of international law,[173] some, in particular in the Bush administration, now regard international judicial institutions with increasing suspicion, if not outright hostility.

Another reason may, paradoxically, lie in the ever-larger intrusion of international decisions in domestic affairs. International adjudication is regarded as acceptable if strictly limited to inter-state affairs (except in matters regarding the use of force, which

[170] For an example of contradictory argument, see Bradley and Goldsmith, *supra* note 159, at 677 (establishment of a central foreign affairs power as one reason for the drafting of the Constitution) and *ibid.*, at 679 (asserting the importance of federalism for conduct of foreign relations). But see now *Sosa v Alvarez-Machain*, No. 03–339, slip op. at 21 (U.S. 29 June 2004) (describing the attempts of the Continental Congress to ensure the observance of the law of nations by the states). For a historical account see Golove, 'The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority', 55 *Stan. L. Rev.* (2003) 1697, with further references. See also Tushnet, 'Transnational/ Domestic Constitutional Law', 37 *Loy.L.A.L.Rev.* (2003) 239, at 244, who suggests that the framers might well have regarded the opinion of the world community as relevant for constitutional interpretation.

[171] Cf. Kagan, *Power and Weakness* (2003).

[172] See, e.g., Weisburd, *supra* note 147, at 937; Rubenfeld, *supra* note 77.

[173] For references see *supra* note 159.

the superpower reserves for itself without judicial control). But the very moment when international adjudication gets out of this box, as in decisions regarding individual and human rights, it seems less acceptable to subject one's own decisions to international control and supervision. Due to the overwhelming interest of US business in world trade, trade matters seem to constitute the great exception.

Thus, the reaction of the US to the trend towards international adjudication has been mixed, at best. Nevertheless, the US not only contributed, in the 1990s, to the creation of the WTO (the hostility of the rank and file of the Democratic Party, *pace* Bill Clinton, towards the WTO is only matched by the hostility of their Republican counterparts, *pace* Colin Powell (and Bush senior), to the United Nations), but it has also not withdrawn from the ICJ. The result is a traditionalist US attitude that is eager to protect superpower sovereignty — as if the only superpower were a newly independent state which still has to assert its sovereignty.

Only strong countervailing domestic interests, such as the business interests in favour of trade, can balance the tendency away from international adjudication. Thus, recently, the Senate Foreign Relations Committee unanimously recommended ratification of the United Nations Convention on the Law of the Sea,[174] supported by business, environmentalists and the US navy. A ratification would be the first instance of the assumption of new obligations of binding arbitration and adjudication in years. One of the arguments advanced was the upcoming review of the Convention and the need to have a seat at the table. Another was the impossibility of using military force for securing most of the interests at stake.[175] And yet, the difficulty of the ratification campaign in the full Senate shows that international adjudication is seen, at best, as a shortcoming that needs to be narrowly confined, rather than an asset to be used to the mutual benefit of the parties. The letter of all former Legal Advisers in favour of US accession is a case in point, emphasizing that the US will opt out of mandatory dispute settlement as far as possible under the Convention, in particular regarding military, law enforcement, and boundary matters.[176] Thus, domestic constituencies for free trade or the freedom of the High Seas may well induce the US to participate in international agreements providing for mandatory dispute settlement — but in the absence of such constituencies, participation will be avoided as far as possible.

One may regret that the US attitude towards international adjudication seems to drift away from a global legal federalism, from transferring to the world the insistence on a government by laws rather than (mostly) men.[177] But at a time when many problems affecting the world citizenry, including the US, cannot be solved at a national level, from global warming to the fight against terrorism, at a time when the

[174] Lugar, 'Foreign Relations Committee advances Law of the Seas [sic] Treaty', available at http://lugar.senate.gov/pressapp/record.cfm?id=218386 (visited 5 April 2004).

[175] See Testimony of John Norton Moore Before the Senate Foreign Relations Committee, 14 October 2003, at 9–10, available at http://www.foreign.senate.gov/testimony/2003/MooreTestimony031014.pdf (visited 5 April 2004). Moore emphasizes the advantages of the vessel release under Article 292 UNCLOS.

[176] Former Legal Advisers' Letter on Accession to the Law of the Sea Convention, 98 *AJIL* (2004) 303, at 304.

[177] In that vein see Simma, *supra* note 5, at 56.

US regards the worldwide promotion of democracy as the core of its foreign policy,[178] and when, while American business spreads over the world, one of the biggest concerns of the American electorate is the outsourcing of jobs overseas, the judicial integration of the US in the international legal community is a condition for American influence in it. Some members of the Supreme Court, whether in public speeches or dissenting opinions, are already going down that road.[179] In a wrap-up of the 2002 Supreme Court term, *New York Times* reporter Linda Greenhouse observed that the Court has 'displayed a [growing] attentiveness to legal developments in the rest of the world and to the court's role in keeping the US in step with them'.[180] The 2003 term was no less momentous, drawing the lines of the respective roles of the three branches of government in times of war and reaffirming the status of international law as part of US law, both federal and state.[181] The implications of these decisions for the relationship between the US and international adjudication are not yet clear.[182] The reaction of the Court to the *Avena* decision of the ICJ will be one of the moments to watch.

[178] See George W. Bush, 'Remarks at the 20th Anniversary of the National Endowment for Democracy', United States Chamber of Commerce, Washington, D.C., 6 November 2003, available at http://www.whitehouse.gov (visited 1 March 2004).

[179] See Breyer, *supra*, note 1; Ginsburg, 'Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication', 40 *Idaho Law Review* (2003) 1, who also provides some historical evidence; O'Connor, 'Federalism of Free Nations', 28 *N.Y.U. J. Int'l L. & Pol.* 35, 41 (1995–1996); *Idem.*, 'Keynote Address', 96 *ASIL Proc.* (2002) 348, at 350: 'Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. This is sometimes called "transjudicialism".'

[180] Greenhouse, 'The Supreme Court: Overview: In a Momentous Term, Justices Remake the Law, and the Court', *N.Y. Times*, 1 July 2003, at A1; cited by Ginsburg, *supra* note 179, at 9.

[181] See the decisions in *Sosa v Alvarez-Machain*, *supra* note 170, slip. op. at 35: 'the domestic law of the United States recognizes the law of nations'; *Hamdi v Rumsfeld*, No. 03–6696 (U.S. 28 June 2004) (legal control of the arrest of US citizens as 'enemy combatants'), *Rasul v Bush*, No. 03–334 (U.S. 28 June 2004) (*habeas corpus* jurisdiction of civil courts over Guantánamo prisoners); *Hoffmann-La Roche v Empagran*, *supra* note 149 (confirmation of the *Charming Betsy* canon of interpretation).

[182] In *Sosa*, Justice Souter cites, in the opinion of the Court, *Diplomatic and Consular Staff in Tehran (US v Iran)*, ICJ Reports (1980), at 3 (slip op. at 42 n. 27) as not establishing a cause of action for brief arbitrary detention, without determining the legal authority of the ICJ decision as such.