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.

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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. 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.’ 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. Thus, one may be tempted to describe the relationship between the US, an early champion of the peaceful settlement of disputes by judicial means (and international law) as one of permanent decline, in which the current administration, with its proudly declared unwillingness to seek permission from others, 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, while the Oklahoma Court of Criminal Appeals sent the case back to a lower court. The US has also resisted, so far, the

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


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* and simply stay away from a Court that has found it so often in breach of its international obligations. 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.

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

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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.

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.

compulsory dispute settlement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{19} Thus, US acceptance of the ‘optional clause’ after World War II, including the famous reservations named after Senators Connally and Vandenberg,\textsuperscript{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.\textsuperscript{21} Until 1979, US acceptance was never seriously tested, neither internationally nor domestically. When the US itself became the focus of the Court,\textsuperscript{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


\textsuperscript{18} For details see Dunne, \textit{supra} note 17, \textit{passim}.

\textsuperscript{19} S.R. 441, 67 \textit{Cong. Rec.} 3605 (1923). See also Dunne, \textit{supra} note 17, at 76.

\textsuperscript{20} For the text, including the Connally and Vandenberg reservations on domestic jurisdiction and multilateral treaties, see \textit{I.C.J. Yearbook} 1984–85, at 100.

\textsuperscript{21} See \textit{Digest of the United States Practice in International Law} 1976, at 650–651, proposing, \textit{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.

\textsuperscript{22} The early cases involving the US were either rejected because of lack of jurisdiction or could be regarded as a draw, such as \textit{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. 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.

Thus, in spite of a later ruling in a maritime delimitation case, which was quite favourable to the US, 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. 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, 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. 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.

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

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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, 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, the judicial character of the Court is said to require a similar approach. 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 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. 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. 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. 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. 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

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).
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.’
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.\textsuperscript{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.\textsuperscript{38} In Legality of Use of Force,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{42}

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


\textsuperscript{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).

\textsuperscript{39} See Legality of Use of Force (Yugoslavia v US), ICJ Reports (1999), at 916 (case removed from the list).

\textsuperscript{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).

\textsuperscript{41} Ibid., para. 97.

\textsuperscript{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. 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. It implemented the Gulf of Maine judgment and settled the Aerial Incident case with Iran at a preliminary stage. 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. The US also maintained, both internationally and domestically, 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. However, the US has followed provisional measures pronounced by the Court in the Avena case, 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. 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.

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.
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.
49 LaGrand (Germany v US), ICJ Reports (2001), 466.
50 Avena and other Mexican Nationals (Mexico v US), Provisional Measures, supra note 3.
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:


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. 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. 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 and preserving the right to leave the WTO following a report by the US Trade Representative. 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. 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

57 The only candidate who has called for withdrawal, US Representative Dennis Kucinich, did not receive much support in the Democratic primary.
Dispute Settlement Body.\textsuperscript{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 \textit{Steel Products} case,\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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 \textit{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.\textsuperscript{65} The International Criminal Court, however, might prosecute US nationals, not only in the increasingly unlikely eventuality of the

\textsuperscript{61} Ibid., 9 ILM (2000) 478.
\textsuperscript{64} See President’s statement on Steel, 4 December 2003, available at http://www.whitehouse.gov.
US acceding to it, but also by way of the exercise of territorial jurisdiction by the ICC over member states.\textsuperscript{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,\textsuperscript{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,\textsuperscript{68} which was approved by huge margins in both houses of Congress, and supported by the Bush administration after changes preserving executive prerogative,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{66} See Rome Statute of the International Criminal Court, Art. 12.


\textsuperscript{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.


\textsuperscript{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.
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).

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. 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. The subsequent condemnation of the continued US practice in the Avena case was the almost logical consequence.

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

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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. 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. On the other hand, as Anne-Marie Slaughter has pointed out, 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”’. Nevertheless, Henkin also asserts that the President has the power — but not the right — to violate international law. And according to Justice Sutherland’s much-cited, even if probably flawed, opinion in Curtiss-Wright, the foreign affairs power of the US, and its President, does not stem from the Constitution.
(only), but has been ‘inherited’ from the prerogatives of the Crown. 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, 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. 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. Nevertheless, the puzzlement of the US Government that an international court could order changes in domestic criminal proceedings is considerable. 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.

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.

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

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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.


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.


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.\textsuperscript{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’.\textsuperscript{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.’\textsuperscript{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’.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{96} The President urged Congress to implement the ruling.\textsuperscript{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.

\textsuperscript{91} See \textit{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 \textit{infra} note 163 and accompanying text.


\textsuperscript{93} \textit{Torres v Mullin}, \textit{ibid}.


\textsuperscript{95} See \textit{supra} note 63 and accompanying text.


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, 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.’ The US Senate has made the non-self-executing character of human rights treaties a precondition for their ratification. 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. In the Nicaragua case, Congress openly supported the administration by allotting funds to the Contras, 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’. 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 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.


101 See supra note 38 and accompanying text.


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.

California was more ready to act than the federal legislature. 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.

As to the WTO Dispute Settlement Body, Congress has expressly denied its decisions any binding effect within the domestic legal order. 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. It should be noted, however, that hardly any other WTO Member has accorded direct effect to the Treaty. 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) was regarded by the DSB as entirely insufficient to meet WTO requirements. 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. 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).


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


tobacco subsidies, it remains to be seen, however, whether both houses can agree on a common version of the bill.\footnote{See Andrews, ‘Tobacco Buyout May Imperil Corporate Tax Bill’, \textit{New York Times}, 17 June 2004, at C1.}

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.

\section*{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 \textit{ultra vires} and thus not binding. This is of course what happened in the \textit{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 \textit{Committee of U.S. Citizens Living in Nicaragua v Reagan}\footnote{856 F.2d 929 (D.C. Cir. 1988) [hereinafter \textit{CUCLIN}].} 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,

\begin{quote}

[\textit{Neither 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.}]
\end{quote}

And further: ‘\textit{Article 94 of the UN Charter [e.g. the duty to comply with ICJ decisions] simply does not confer rights on private individuals.}’\footnote{CUCLIN, at 934.}

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.\footnote{CUCLIN, at 937.} By overriding the obligations of the US under the Charter through its legislation funding the Contras, Congress benefited from the \textit{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 ‘\textit{no enactment of Congress can be challenged on the ground that it violates customary treatment}’\footnote{CUCLIN, at 933–935. Cf. \textit{Baker v Carr}, supra note 31.}
international law'. 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. 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.

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. 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. 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, but also by the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).

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

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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.


measures against the pending execution of Breard, the surviving LaGrand brother and several Mexican citizens. 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]’ 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. 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, such as such. And yet, he applied the Charming Betsy canon of interpretation 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’. 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

130 U.S. v PLO, supra note 128, at 1462.
132 U.S. v PLO, supra note 128, at 1470.
more time to examine the opinion of the ICJ more deeply.\textsuperscript{133} In the subsequent Torres case, one of these two justices, Justice Breyer, dissented to the denial of certiorari,\textsuperscript{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’.\textsuperscript{135} These voices have remained in the minority, though.\textsuperscript{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.\textsuperscript{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.\textsuperscript{138} Only in one case did a US District Court explicitly apply the LaGrand reasoning.\textsuperscript{139} Only one Ohio Supreme Court justice found the violation important enough to vacate a respective judgment.\textsuperscript{140} More promising was the judgment of a US District Court in New York which granted damages for
unlawful arrest in connection with a violation of the Vienna Convention,\textsuperscript{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\textsuperscript{142} and has thus abided by the order of the Court, differing from its behaviour in the \textit{Breard} and \textit{LaGrand} cases. Due to the attitude of its courts, the US, in the \textit{Avena} proceedings, saw a better prospect for the implementation of the judgment in clemency rather than as a matter of right,\textsuperscript{143} despite the fact that the Supreme Court regards clemency as an extra-judicial, purely political process.\textsuperscript{144} It did not come as a surprise that the ICJ rejected such review based on grace rather than on judicial proceedings.\textsuperscript{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.\textsuperscript{146}

It is one thing to reject a claim that judgments of the ICJ are directly applicable in domestic law,\textsuperscript{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 \textit{Breard}, \textit{LaGrand}, and \textit{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, \textit{pace} the \textit{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 \textit{LaGrand-Avena} jurisprudence. In the \textit{Atkins} and \textit{Lawrence} decisions, the US Supreme Court has recently taken account of the opinion of
international courts and tribunals, 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. 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.

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. 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. 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. The concurrent opinion by Judge Chapel also referred to Avena. The federal 5th Circuit Court was less moved by the ICJ, however. 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.

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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).


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.


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).
The so-called ‘new federalism’ 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, 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’.

The US Supreme Court has remained largely unmoved, however. In 1920, in *Missouri v Holland*, 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. Recent jurisprudence confirms the leading role of the federal government in foreign affairs.

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. Even well-meaning states, such as California, introduced implementing legislation, as if

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


such legislation were necessary.  

As 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.  

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.’  

Apparently, the reaffirmation of the ICJ’s international authority over all state officials 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,  

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, referring to Avena. The Oklahoma Court of Criminal Appeals sent the case back to a lower court.

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’, 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

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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.


168 See supra note 153 and accompanying text.

disregarded. 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. 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. 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, 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.


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, 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. 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. 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. 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

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, 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. 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’. 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. The implications of these decisions for the relationship between the US and international adjudication are not yet clear. The reaction of the Court to the *Avena* decision of the ICJ will be one of the moments to watch.

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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.