

**INTERNATIONAL LAW BEFORE MUNICIPAL COURTS: THE ROLE OF
INTERNATIONAL COURT OF JUSTICE DECISIONS IN DOMESTIC
COURT PROCEEDINGS WITH SPECIFIC REFERENCE TO UNITED
STATES CASE EXAMPLES**

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ABSTRACT

In the case of *LaGrand (Germany v United States)*, the International Court of Justice held that the United States (US) had violated its international obligation to Germany under the Vienna Convention on Consular Relations when it executed two German nationals without first informing them of their consular rights. The case came before the court after the United States had disregarded a preliminary ruling passed by the ICJ, which directed the US not to execute the German nationals pending the outcome of the ICJ case. The decision raised the issue of the effect of ICJ decisions in domestic proceedings and the effectiveness of ICJ enforcement mechanisms. This thesis considers the possibility of a role for national courts as active enforcers of ICJ decisions. It is argued that whilst evidence shows that there is no legal obligation on courts to enforce ICJ decisions, there is certainly room in international law to facilitate this development. In support of this argument, the thesis demonstrates how basic presuppositions about international law have shifted over the last few decades. This shift has been both the impetus and the result of globalisation. The case of *LaGrand* alongside similar cases is used to show how national courts may play an increased role in the enforcement of ICJ decisions.

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CHAPTER 1

INTRODUCTION

Contents

1. *Background to thesis*
 2. *Objective of the thesis*
 3. *Outline and Approach*
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1.1 BACKGROUND TO THESIS

The consensual nature¹ of the International Court of Justice (hereinafter referred to as the ICJ) has been one of the high-ranking reasons for its limited jurisdiction.² It is suggested, however, that the limited number of states accepting the court's jurisdiction is not "the disease itself but the symptom".³ The disease is the court's previous inability to pass judgments that reflect changing social norms in the international community and the court's poor enforcement mechanisms. In the past the court exhibited a tendency to prefer the old Westphalian system, which hailed the preservation of sovereignty as supreme. This is well illustrated by some of the judgments passed by the court. South West Africa (*Ethiopia v South Africa; Liberia v South Africa*)⁴ is an apt example.⁵ The case had two phases, but it is the second phase

¹ The ICJ only has jurisdiction over those states, which consent to its jurisdiction. SEE Article 36 of the ICJ Statute where it states that the function of the court is to decide in accordance with international law such disputes as are submitted to it.

² Skordas 'ICJ: Guardian of Sovereignty or Catalyst for Integration' (2002) 8 *International Legal Theory* 49.

³ *Ibid.*

⁴ (SEE judgment of 18 July 1966) 1966 ICJ Reports 6. Accessed at <http://www.icj-cij.org/icjwww/idecisions/isummaries/ilsaesasummary660718.htm> on 15 November 2005).

⁵ In this case the Applicants alleged that South Africa had breached the League of Nations Mandate over South West Africa. The alleged contraventions were of a humanitarian nature. The court however did not deal with the merits of the claim since it held that the Applicants had no standing to bring the matter. For more examples, see the Nicaragua case of 1986, (Accessed at <http://www.icj-cij.org>)

of the case that is of concern. In this case the court refused to enquire into various allegations brought by Liberia and Ethiopia (in their capacity as concerned members of the League of Nations) that South Africa was breaching its mandate over South West Africa. Some of the alleged contraventions were of a humanitarian nature, in that the Applicants were questioning whether the Respondent had promoted the moral well-being and the social progress of the inhabitants of South West Africa. It was held that the Applicants did not have standing to bring the matter before the Court. This finding was based on the premise that members of the League of Nations (such as Liberia and Ethiopia) could not litigate on 'conduct provisions' (any provision pertaining to the power and obligations of a Mandatory over the inhabitants of a particular territory) unless the Applicants could prove a 'special interest' or legal right in the matter. The effect of the decision was to say that even humanitarian considerations are not in themselves sufficient to generate legal rights and obligations and there must be some other established legal right to warrant an enquiry into the contraventions.⁶ The South West Africa cases thus strengthened an authoritarian version of state sovereignty at the expense of the international interests in safeguarding human rights and promoting change in the international legal system.⁷

1.1.1 *Germany v United States*⁸

Despite this history, the court has recently adopted certain standpoints that appear to indicate an abandonment of this traditionalist worldview of international law. In the case of *LaGrand (Germany v United States)*⁹ (hereinafter referred to as *LaGrand*), the ICJ took a bold decision, and ruled on a matter that implicated a nation's criminal justice system, something that is traditionally regarded as a municipal law matter.¹⁰

<http://www.icj.org/icjwww/icasess/inus/inusframe.htm> on 15 November 2005) and the Nuclear Weapons Advisory Opinion of 1996 (Accessed at <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm> on 15 November 2005).

⁶ *South West Africa Case* (second phase).

⁷ Skordas (2002) 8 *International Legal Theory* at 52.

⁸ *Germany v United States* (judgment of 27 June 2001). Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 5 November 2005).

⁹ *LaGrand* (judgment of 27 June 2001).

¹⁰ *LaGrand* (Judgment of 27 June 2001) para 52.

Germany had filed an application in the ICJ against the United States (hereinafter referred to as U.S.) concerning the impending execution of two German nationals resulting in a provisional measures order being issued by the ICJ.¹¹ The order was however disregarded by the U.S. and the matter brought before the court for a final determination. One of the court's most significant findings in the judgment is that the procedural default rule¹² as applied by the U.S. criminal courts prevented foreign nationals from exercising their rights under Article 36 of the Vienna Convention on Consular Rights (VCCR)¹³. This is a U.S. rule that originates in the state laws of criminal procedure. The rule governs post-conviction relief in any criminal case and requires that if a defendant is to challenge his conviction, he must first have raised all claims either at the trial court level or in his first appeal. If the defendant fails to do so, his claim is deemed to be waived or procedurally defaulted. Thus in the U.S. if a foreign detainee does not raise a violation of the VCCR at the trial stage or during his first set of appeals, he is deemed to waive his claim.¹⁴ The ICJ thus ordered that in the future the U.S. courts should consider such a claim on the merits, and allow review and reconsideration of both the sentence and conviction regardless of the stage in the litigation.

The ICJ order in *LaGrand* is significant because the ruling effectively requires the U.S. courts to disregard the procedural default rule when an accused raises a violation of Article 36. The U.S. argued that many of Germany's submissions in the case required the ICJ to address and correct U.S. errors of law and errors of judgment by U.S. judges.¹⁵ The U.S. alleged further that this would amount to the ICJ playing the role of an ultimate court of appeal in criminal proceedings, a role it was not

¹¹ *LaGrand* (Provisional Measures Order of 3 March 1999) Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 6 November 2006.

¹² For an in-depth discussion of the rule see Weinman "The Clash between U.S. Criminal Procedure and The Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the *LaGrand* case" (2001-2002) 17 *Am. U. Int'l L. Rev.* 857 at 880.

¹³ All references to "Article 36" in this thesis, except where otherwise indicated, are to Article 36 of the VCCR.

¹⁴ See for instance section 32 of the Arizona Rule of Criminal Procedure.

¹⁵ *LaGrand* (judgment of 27 June 2001) para 50.

empowered to carry.¹⁶ The latter opinion is founded on the premise that the recognition of state sovereignty places a prohibition on the ICJ to intervene in matters that implicate domestic policy.¹⁷ This is the traditional understanding of sovereignty, which in this globalised context must now give way to a more balanced appreciation of sovereignty.¹⁸ In response to the U.S. objections, the ICJ stated that its role in the case was merely to interpret the scope and application of the VCCR and in so doing; it was not engaging in any exercise contrary to its founding statute.¹⁹ The ICJ in *LaGrand* therefore showed its ability to apply international legal principles to develop international law, even where this may implicate domestic proceedings. Yet the effectiveness of the judgment lies in its implementation.

In analysing academic commentaries on the case, there is a general sentiment that the U.S. courts have failed by not implementing the ICJ decision.²⁰ Some have openly stated that the U.S. has simply responded in a way that reflects U.S. aberrance of

¹⁶ *Ibid.*

¹⁷ The ICJ Statute is silent on this aspect, but Article 2(7) of the United Nations Charter prohibits the United Nations from intervening in any matter that is essentially within the domestic jurisdiction of a State. This clause is an outworking of Article 2(1) of the Charter which recognises the sovereignty of all states.

¹⁸ The traditional understanding of sovereignty is as it was defined at the Peace of Westphalia. This definition refers to a state's right to autonomy (self-rule) and to be left alone. Recent jurisprudence is critical of this view of sovereignty on the basis that it is obsolete because society has evolved from insular states to interaction. These ideas are encapsulated by Slaughter "Sovereignty and Power in a Networked World Order" (2004) 40 *Stan. J. Int'l L* 283-327.

¹⁹ See *LaGrand* (judgment of 27 June 2001) para 53, where the court noted implicitly that its decision would implicate matter of a domestic nature. In response, the court left the issue of an appropriate remedy to the U.S. to determine. In this way, the ICJ was able to develop international law by interpreting the VCCR without overstepping its mandate in terms of art. 2(7) of the U.N. Charter.

²⁰ See the following: Drinan "Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts after *LaGrand*" (2001-2002) 54 *Stan. L. Rev.* 1303 in which she comments that the U.S. courts should implement the ICJ decision because they are well equipped to do so having the experience to balance rights and employ prejudice analysis where the criminal justice process has been tainted. Ray "Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular relations" (2003) 91 *Cal. L. Rev.* 1731 where Ray proposes that the only guarantee to the observance of the VCCR in future cases is a definitive decision that conforms to the ICJ decision by the U.S. Supreme Court. Fitzpatrick "The Unreality of International Law in the United States and the *LaGrand* Case" (2002) 27 *Yale. J. Int'l L.* 427 shows that the deficiency in U.S. practices with respect to consular rights is a telling reflection of the unreality of international law in U.S. For a differing opinion see Weisburd "International Courts and American Courts" (1999-2000) 21 *Mich. J. Int'l L.* 877 in which he argues that neither the Statute of the ICJ nor the U.N. Charter create a binding obligation on national courts to implement even its binding decisions.

international law.²¹ This thesis advocates that theories that base their criticism of the U.S. court responses purely on legal grounds have failed to take cognisance of the international context in which international law operates.²² The thesis thus considers whether there is a legal obligation on national courts to implement ICJ decisions.²³

1.1.2 Significance of the *LaGrand* case

LaGrand was not the only decision to raise this issue of the VCCR. The matter was raised pre- *LaGrand* in the case of *Breard*²⁴ and was revisited post -*LaGrand* in the case of *Avena and other Mexicans Nationals*.²⁵ The trilogy of cases is of academic interest and importance because they present a rare instance where the treaty obligations of a state affecting individual rights became the subject of binding international adjudication. The cases are a clear manifestation of the tensions that can exist between international law and domestic law, whilst simultaneously raising the question of the role of ICJ decision in domestic law. Resultantly at one level, the

²¹ Paulus "From Neglect to Defiance? The United States and International Adjudication" (2004) 15 No. 4 *EJIL* 782-812, Fitzpatrick (2002) *Yale. J. Int'l L.* 427.

²²The disciplines of international law and politics are inextricably linked, more so when dealing with the ICJ which has jurisdiction over inter-state cases. As such, any action taken by a national court which implicates international obligations necessarily touches on foreign affairs matter, which is a political matter. (For a further discussion on this see Reus-Smit *The Politics of International Law* (2004) 14). It thus follows that many political doctrines form a barrier to national court enforcement of ICJ decisions; for instance the political question doctrine and the doctrine of separation of powers. The former prohibits courts dealing with matters of a political nature since they are deemed to be best handled by the political branches of government. The latter is a common principle in many democratic states that requires a clear demarcation between the responsibilities of the different branches of government. For a further discussion of this see chapter 5 of this thesis and Weisburd (1999-2000) *Mich. J. Int'l L.* 877.

²³ Weisburd ((1999-2000) *Mich. J. Int'l L.* 890) is of the opinion that there is no obligation for domestic courts to implement even binding provisional decision of the ICJ. This is supported by Sellers ("The Authority of the International Court of Justice" (2002) 8 *International Legal Theory* 41) who in his article on the authority of the ICJ, argues that decisions of the ICJ are not decisive evidence of international law and therefore the ICJ has no scope to create law international and its mandate stops at resolving disputes placed by parties before it. However, Skordas ("ICJ: Guardian of Sovereignty" (2002) 8 *International Legal Theory* 49) puts forward a proposition for the role of the ICJ as a catalyst for integration as opposed to a guardian of sovereignty. He argues for a greater role for the ICJ that goes beyond it merely settling disputes.

²⁴ *Vienna Convention on Consular Relations (Paraguay v United States)* [1998] ICJ Reports 248 (Order of 10 November 1998). Accessed at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm> on 6 November 2005.

²⁵ *Avena And other Mexican Nationals (Mexico v United States)* (decision of 31 March 2004). Accessed at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> on 6 November 2005.

cases demonstrate the ICJ's ability to develop international law by unapologetically adopting strong positions whilst on another level the cases raise the issue of the enforcement of international decisions by national courts.

The significance of the cases is enhanced by the involvement of the death penalty issue. The majority of democratic nations across the world have abandoned the death penalty as a form of criminal sanction. It is thus not surprising that the international community should take a keen interest in the just administration of this form of punishment where it is retained. Babcock discusses the increased role that international law has to play in US death penalty cases.²⁶ She notes in particular that many litigants who once perceived international law as "impractical and exotic" are now invoking international treaties in state courts to review decisions of foreign courts and international tribunals. There is thus a proliferation of matters involving treaty obligations being raised by citizens in domestic courts. Francioni puts it as follows:

"Today international law pervades areas traditionally reserved to the domestic jurisdiction of states... Adjudication in these areas requires a difficult blending of national and international norms and the application of techniques to solve possible conflicts between the two legal orders, as well as the dilemma of how to reconcile separation of powers between the executive and the judiciary with the rule of law and the independence of judges."²⁷

This calls for a clear policy to be adopted by the U.S courts to deal with Article 36 litigation²⁸ in response to the ICJ decision and a lesson to the rest of the world on how globalisation could potentially change both international and national legal relations.

²⁶ Babcock "The Role of International Law in U.S. Death Penalty Cases" (2002) 15 *LJIL* 367.

²⁷ Francioni "International Law as a Common Language for National Courts" (2001) 36 *Tex. Int'l L. J.* 587 at 588.

²⁸ Schiffman "Breard and Beyond: The Status of Consular Notification and Access under the Vienna Convention" (2000) 8 *Cardozo J. Int'l & Comp L.* 27 at 31.

1.1.3 The role of domestic courts in implementing ICJ decisions

Apart from the need to address VCCR violations in the United States, the thesis adds to the body of literature by discussing the possibility of national courts implementing ICJ decisions in a manner that sheds light on the nature of the relationship between the ICJ and national courts. Henkin says "...almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."²⁹ Whilst this may be acceptable, it is certain, as it will be seen later, that there are sufficient problems with non-compliance of ICJ decisions for the idea of national courts as potential enforcers of international law to warrant discussion. *LaGrand* is but one example of non-compliance with international obligations, but also a perfect springboard for the discussion on the role of national courts in international law.

Conforti, writing on the relationship between international law and municipal law, comments that international law has seen remarkable progress in terms of content but very little such progress in respect of procedures and application.³⁰ He thus adds that for maximum efficacy in enforcement, international law must rely on domestic officials. Many authors will comment to the same effect: that international law enforcement mechanisms are inadequate and as a result must rely on domestic enforcement.³¹ Internationalists argue that national courts as comparatively independent institutions are better positioned to enforce international law which then promotes the international rule of law; and the international rule of law if effectively established will curtail the abuse of political power.³² Few others are found to make a case for national courts being active enforcers of ICJ decisions.³³ *LaGrand* is thus a useful platform to discuss this matter and reflect on ways that national courts can relate to the ICJ to improve the implementation of its decisions. Francioni, writing on

²⁹ *How Nations Behave: Law and Foreign Policy* (1979) at 47.

³⁰ "Notes on the Relationship between International and National Law" (2001) 3 *International Law Forum du droit international* 18 at 18-24.

³¹ See for example Ray (2003) *Cal. L. Rev.* 1731.

³² Kumm "International Law in National Courts: the International Rule of Law and the Limits of the Internationalist Model" (2003-2004) 44 *Va. J. Int'l L.* 20 at 24.

³³ See Ray (2003) *Cal. L. Rev.* 1731, Slaughter & White "The Future of International Law is Domestic (or The European Way of Law)" (2006) 47 *Harv. Int'l L.J.* 327.

the application of international law by national judges, says that in the wake of a new globalised community, the traditional straitjacket roles of national courts should be stripped away.³⁴ He argues in favour of the removal of all obstacles that hinder the effective enforcement of international law by national courts such as judicial deference to the executive. Kumm, discussing the concept of an internationalist model and the international rule of law, finds that there is support for the claim that national courts may be active enforcers of international law, although there are limits to this power.³⁵ International legal theory has thus begun to call for a shift in jurisprudence both at national and international levels to accommodate the changing global values³⁶ and reflect the role of the judiciary in an inter-connected world.

This controversial decision in *LaGrand* shows a dramatic shift from the old conservative jurisprudence of the court and suggests that the ICJ and other international tribunals have a greater role to play in easing the tension between international law and municipal law. According to Tams, the strength of the *LaGrand* decision is that the court did not confine the decision to questions of the interpretation of its own statute.³⁷ Consequently, he suggests that the decision can have far-reaching effects that go beyond the mere facts before the court.³⁸ The message this sends out to other courts is that an inherent function of adjudicative bodies is to order interim measures that prevent irreparable harm by preserving the status quo.³⁹ The ICJ is the United Nations' premiere judicial body which means that any principles laid out by

³⁴ (2001) *Tex. Int'l L. J.* 587.

³⁵ (2003-2004) *Va. J. Int'l L.* 20.

³⁶ This is manifested by the call for contemporary definitions of traditional ideologies such as sovereignty and nationalism. For a further discussion on this, see Chapter 2 of this thesis.

³⁷ Tams "Recognising Guarantees and Assurances of Non-Repetition: *LaGrand* and the Law of State Responsibility" (2002) 27 *Yale. J. Int'l L.* 441.

³⁸ *Ibid.*

³⁹ This is of importance because the ICJ is the judicial body of the U.N. and the oldest international court. As such, other courts may look to the principles it applies to resolve its own disputes or even in the construction of some of their founding documents. (See Alford "The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance" (2000) 94 *Am. Soc'y Int'l L. Proc.* 160, where he shows that the last decade has seen an explosion of new international courts and tribunals. He estimates that at the time of his writing over 50 international courts and tribunals were in existence.)

the court will be significant for smaller tribunals, which place great weight on ICJ decisions.⁴⁰ If this opinion is taken as valid, then it means other international courts and tribunals might in future endeavour to use national courts to enforce their decisions in the same way that the ICJ has done.⁴¹

These factors, combined with the impact of globalisation in the international order, suggest that there is a shift in the traditional roles of both international courts and the national courts. Thus a matter that warrants discussion is the role that these courts can play in this modern international community, not just to settle disputes, but to integrate the international community and reduce any tensions that exist between international law and domestic proceedings.

1.2 OBJECTIVE OF THE THESIS

The main objective of this thesis is to consider whether domestic courts can be used as active enforcers of ICJ decisions to ensure compliance with international decisions and the advancement of international law. This will be done through the analysis of the trilogy of cases already discussed. The focus of the thesis will be on *LaGrand* with reference being made to *Breard* and *Avena* to clarify certain aspects of *LaGrand*. The research takes two angles: first it looks at the ICJ's capacity to advance international law within domestic borders through its decisions, and thereafter the application of international court decisions by national courts. The following questions will be addressed:

⁴⁰ Tams (2002) *Yale. J. Int'l L.* 441.

⁴¹ The practice of using national courts to enforce decision of supranational courts is already at work in the European Community. This is discussed in Chapter 6 of this thesis. For further reading see Jones "Opinions of the European Union in National Courts" (1995-1996) 28 *N.Y.U.J.Int'l L & Pol.* 27 in which it is stated that the co-operation between courts of the EU member states and the European Court of Justice provide an encouraging example of judicial co-operation to bring integration to a community. In Maher "National Courts as European Community Courts" (1994) 14 *Legal Stud.* 226 it is shown that national courts judges have effectively become community judges as part of the natural embedding process of EU community law into its member states. Slaughter "Judicial Globalisation" (1999-2000) 40 *Va. J. Int'l L.* 1103 at 1104 where Slaughter shows that the role of national courts as enforcers of EU community law was central to the construction of the EU as a community.

- Can ICJ decisions play a greater role in domestic proceedings without the ICJ overstepping its mandate?⁴²
- In this regard, can a balance be struck between intervention and mere supervision?⁴³
- Can the decision in *LaGrand* be brought before national courts for enforcement? Should national courts issue injunctive relief to prevent digressions by defiant governments?⁴⁴
- How should U.S. national courts approach the question of whether to enforce international law claims made in cases before them?⁴⁵
- Do the demands of a more connected world require a more proactive role for national judiciaries as aggressive enforcers of international law?⁴⁶

1.3 OUTLINE AND APPROACH

The remainder of the thesis consists of six chapters. Chapter 2 consists of a theoretical overview, in which the foundational presuppositions of the thesis are laid down through the analysis of specific ideologies. The chapter looks at the impact of

⁴² The Statute of the ICJ sets out what the court can and cannot do. Thus any argument that supports a more injunctive approach by the court must necessarily show that the court would be permitted to do so. This requires some consideration of the ICJ Statute and the U.N. Charter to reflect on the boundaries of the ICJ's mandate. Additionally, this question is important because the court only has jurisdiction by consent. This means that its institutional integrity rests upon on its members being satisfied with its performance and could be drastically harmed by unauthorised action by the court.

⁴³ The court in *LaGrand* appeared to be tight roping between intervention and supervision. On the one hand, the court's decision was an intervention to prevent future abuse of consular rights in domestic law which is welcomed, whilst on the other it appeared as if the ICJ was supervising U.S. domestic criminal justice policies, in which case it is not welcomed.

⁴⁴ Schabas 'The ICJ Ruling against the US: Is it Really About the Death Penalty?' (2002) 27 *Yale J. Int'l L* 446. This issue seeks to address the question of whether an individual who finds himself in the same position as the *LaGrand* can demand review and reconsideration of his sentence and conviction on the basis of the decision by the ICJ in *LaGrand*.

⁴⁵ Tams (2002) *Yale. J. Int'l L* 441. This warrants discussion because matters of international law are very often of a political nature and therefore in the realm of foreign policy. It is thus generally accepted that these matters should be dealt with by the executive. If national courts begin to enforce international decisions, they would have to tread gently in order to avoid breaching the doctrine of separation of powers.

⁴⁶ Francioni (2001) *Tex. Int'l L. J.* 587.

globalisation on international legal theory and argues for the redefining of traditional theories in international law in order to reflect current international legal relations. Attention is drawn to the notions of sovereignty, nationalism and internationalism. These concepts have been used to either argue for or against a greater involvement of international law in domestic jurisdictions.⁴⁷ The chapter shows that modern international theorists have begun to redefine these concepts and review their place in international legal theory because of the increased interconnectedness that has come as a result of globalisation. The age old monist/dualist debate is revisited, but the chapter shows that the debate is of little practical use. It is then argued that it is more fruitful to analyse the general practice of states to understand the relationship between international law and domestic law. The chapter is thus a theoretical overview that sets out my foundational presuppositions about how international law works.

Chapter 3 then focuses on the role of the ICJ as an institution for dispute resolution. It seeks to show that the court operates within the specific constraints of its enabling statute and the U.N. Charter. This does not however fetter its ability to develop international law through its decisions. The chapter also shows the poor enforcement mechanisms of the court as a springboard to the argument in later chapters for increased involvement of national courts in the enforcement of ICJ decisions.

Chapter 4 is an in-depth analysis of ICJ decisions in *Breard*, *LaGrand* and *Avena*, which shows the problems discussed in the thesis manifest practically. Included is an analysis of the ICJ's ability to ease the tension between international law and domestic law, its ability to adjudicate in human rights related matters and its power to issue binding provisional measures. The latter issue highlights the court's institutional authority, whilst the former issues are used to explain the court's response in *LaGrand*. The chapter is thus an exposition on the court's reaction to issues that implicate domestic legal proceedings.

⁴⁷ Nationalism has generally been understood as a synonym for self-interest whilst internationalism is associated with the pursuit of the collective good. SEE Insanally "Nationalism: No Longer a Domestic Dispute" (1993-1994) 26 *N.Y.U.J. Int'l L. & Pol.* 439. Thus it has been argued that in the age of globalisation, nationalist ideology should be abandoned for a more internationalist position. See generally Burley "Toward an Age of Liberal Nations" (1992) 33 *Harv. Int'l L.J.* 393.

The thesis then shifts to the response of the United States to the ICJ decision. Chapter 5 looks at the attitudes of U.S. national courts towards the ICJ and the possibility of national courts becoming active enforcers of ICJ decisions. Also covered in this chapter are the hurdles to national court enforcement of ICJ decisions such as the political question of doctrine and separation of powers in domestic government. Thus it centres on the response of the U.S. courts, but in so doing manifests the general difficulties that would be faced by the judiciary in constitutional states, were they to become active enforcers of ICJ decisions.

Chapter 6 describes how courts can relate to each other in the international arena to alleviate the tension between international law and domestic law. The chapter considers the notion of judicial comity⁴⁸ as a justification for increased deference to international courts by national courts. The European Union is used as an example of a system that has managed to integrate the community through the medium of the courts. The chapter thus considers the possibility of achieving judicial co-operation between national courts in the U.S. with the ICJ on the basis of judicial comity.

The thesis winds up in Chapter 7 with reflections on the conclusions drawn in the previous chapters. Recommendations are made with the primary purpose of showing that national courts can advance the observance of international law through their decisions.

1.4 SOURCES AND METHODOLOGY

The research method to be adopted is standard desktop research, with extensive use of the internet. No empirical research is undertaken. International law research by its nature involves the consideration of various systems of law and as a result, no comparative studies *per se* are used. Rather, a hybrid method of research that involves multiple countries are adopted. Data is gathered from various published works: journal articles and textbook literature along with opinions in international jurisprudence.

⁴⁸ Slaughter "Court to Court" in "Agora: Breard" (1998) 92 *Am.J.Int'l L* 711 in which Slaughter refers to the term to mean respect of other courts qua courts. Thus the term refers to judicial courtesy.

CHAPTER 2

THEORETICAL OVERVIEW

Contents

1. *Introduction*
 2. *Globalisation*
 3. *Sovereignty*
 4. *Nationalism and Internationalism*
 5. *Theories on the relationship between international law and domestic law*
 6. *Conclusion*
-

2.1 INTRODUCTION

The purpose of this chapter is to outline the general theories of international law as a foundation to the research. Today's world is much smaller than yesterday's, in the sense that there is greater connectivity manifested through the intertwining of economic, political, social and legal spheres. This extraordinary enmeshment of activity has been classified under the rubric of globalisation. As a consequence this has reshaped international society, and in response to this, international legal rules must change to remain applicable to this globalised society. Any discussion on the relationship between international law and domestic law will raise theories of monism and dualism, sovereignty, nationalism and internationalism. This chapter thus seeks to show that in order to remain relevant, these theories have to be re-evaluated. With a plethora of theories, only those that are directly relevant to the topic have been selected, as they highlight the research problem and inform the research conclusion.

It is one's fundamental presupposition about the make-up of international law that strongly influences the conclusion. As such, the theories are explored in a manner that displays my understanding of the ideologies and their practical significance. The problem of the interaction between international and municipal law has been the

subject of a long-standing debate between monists and dualists.⁴⁹ These theories are revisited because they highlight the complexity of the relationship between courts on an international level and courts at the municipal level. Nationalism and internationalism are political and sociological ideologies that have been expressed by some writers in their argument for a greater involvement of international law in domestic procedures or vice versa. A balance of these two theories is advocated in the chapter, since neither extreme accurately reflects modern international law. The age-old barrier to international law permeating the municipal realm is the notion of sovereignty. As the international legal plane evolves from autonomy to interaction, the old concept of sovereignty as a nation's right to be left alone is no longer seen as valid. The chapter will thus show new ideas of the concept of sovereignty that are seen to be more compatible with the current global ethos.

The focal point of the discussion is thus the impact of globalisation on the traditional theories of international law; more specifically, those that explain the relationship between the international and the domestic. It is argued that some, although not all, old practices: must be re-examined and developed to keep in line with the times. The chapter thus begins by stating clearly what globalisation is. It then focuses on the theories referred to above and how these should be understood in our modern context.

2.2 GLOBALISATION

Globalisation is the new buzzword. It is touching and changing all spheres of life. It is both the fact that the phenomenon is unavoidable and its far-reaching effects that have warranted its discussion in this chapter. The purpose of this section is thus to attempt to define my understanding of this concept and assess the impact of globalisation on specific aspects of international law.⁵⁰

⁴⁹ See generally Dugard *International Law: A South African Perspective* 3ed (2005) 47-48.

⁵⁰ Held *et al* "Globalization" (1999) 5 *Global Governance* 483 stress the importance of clarifying what globalisation actually is. They demonstrate that the debate that has been raging in academic circles for the past decade is the wrong debate to have when there is no common ground about globalisation is.

2.2.1 Defining Globalisation

Globalisation can broadly be understood as the accumulation of links across the world's major regions and across various domains of society.⁵¹ It has had the effect of speeding up the world, deepening the dependence of states on each other and stretching social, political, and economic activities.⁵² All this means that distant events have a deeper impact on us and the previously defined boundaries between the domestic and the international have become increasingly blurred.

2.2.2 Effects of Globalisation on international law

Globalisation is the pervading theme of this thesis because it is in response to this phenomenon that an increased role for the ICJ in domestic law is contemplated. It is also the connectedness brought about by globalisation that spurs a discussion on the necessity to introduce national courts as active enforcers of ICJ decisions.⁵³ Discourse surrounding globalisation has often revolved around whether this phenomenon strengthens or weakens sovereignty.⁵⁴ This debate is considered later in the chapter. For the purposes of this section, globalisation has brought change in three aspects. Firstly, it is contended that it has brought international law into the limelight and given it recognition where it once was looked upon as an anomaly, lacking the status of national law. Secondly, it has allowed for an increased role of non-state parties in international law, and finally it has encouraged the assimilation of international legal norms into domestic law; for example, human rights norms.

⁵¹ Held *et al* (1999) *Global Governance* 484.

⁵² *Ibid.*

⁵³ Globalisation has increased access to information and a result is that matters that were traditionally of international concern are being raised before domestic courts. See Babcock "The Role of International Law in US Death Penalty cases" (2002) 15 *LJIL* 367.

⁵⁴ Fidler "Introduction: The Rule of Law in the Era of Globalisation" (1998-1999) 6 *Ind. J. Global Legal Stud.* 421. Many writers will say that one of the features of globalisation is the steady withering away of state sovereignty. See for example, Udombana "Globalization of Justice and the Special Court for Sierra Leone's War Crimes" (2003) 17 *Emory. Int'l L. J.* 55.

2.2.2.1 The renewed importance of international law

Globalisation seems to be the new organising principle in society and international law is its principal beneficiary.⁵⁵ In the years immediately following World War II, international law was treated as an anomaly. The inter-war years led to great hopes that international law would be able to restore peace and order to the world but these hopes were dashed by World War II. The effect was that people lost confidence in international law as a means to resolve disputes in the international field.⁵⁶ However, with the increase of communications technology, the world became 'smaller' and increased interactions gave rise to the need for international regulatory mechanisms. Thus it can be said that globalisation had the effect of thinning the international law and domestic law divide insofar as certain aspects of modern life, such as the media and portions of commerce and industry, have now become international.

The baseline of the argument is that due to globalisation, international law has gained significance. Take for example the growing importance of international law in domestic legislation. In many countries, one can find constitutions that make reference to international law in the body of the text. South Africa is a prime example of this. Section 233 of the constitution⁵⁷ provides that:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

The place of international law in the South African republic is further entrenched by section 231 of the constitution which deals with international agreements and section 232 which establishes the recognition of customary law as law within the Republic. South African courts are also enjoined to consider international law in their interpretation of the Bill of Rights by section 39(1)(b) of the constitution. The incorporation of treaties into national law is also an indication of the growing

⁵⁵ Schapiro “Globalisation, International law and the Academy” (1999-2000) 32 *N.Y.U.J.L & Pol* 567 at 570.

⁵⁶ *Ibid.*

⁵⁷ The Constitution of the Republic of South Africa Act 108 of 1996.

importance of international law. For instance, some constitutions allow the automatic incorporation of treaties into domestic law once it has been duly approved by the legislature.⁵⁸ Such examples include South Africa,⁵⁹ France⁶⁰, the Netherlands,⁶¹ and Austria.⁶² This innovation, in many cases, is a fairly recent and modern move.

A more apt example of the power that international law has gained in national law is in the *LaGrand*⁶³ decision (the full facts of which appear in Chapter 4). U.S. disregard of the ICJ decision aroused much criticism from international academics and practitioners. Underlying the various criticisms is the thought that globalisation makes the already poor response of the U.S. worse because of the reciprocal nature of some international obligations. So, some writers, in denigrating the actions of the U.S., have used as their argument the fact that so many American nationals are living under foreign governments.⁶⁴ Thus the argument goes that the rights of foreign nationals within America's borders should be respected because that allows the U.S. to promote good relations with other countries, thereby ensuring the comfort of their own nationals residing outside the U.S. This, as it will later be seen, is a good example of how the interconnectedness of the world and the ease of travel and communications brought about by globalisation has promoted the recognition of international laws.

2.2.2.2 Subjects of international law

Modern politics emerged with and was shaped by the development of communities tied to a particular piece of land; the nation state.⁶⁵ As such, the state was the main

⁵⁸ Dixon and McCorquodale *Cases and Materials on international law* (1991) 123.

⁵⁹ Section 231(4) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁶⁰ Article 55 of the Constitution of the Republic of France of 1958.

⁶¹ Article 91 of the Constitution of the Kingdom of the Netherlands 2002.

⁶² Article 50 of the Constitution of Austria 1929.

⁶³ (*Germany v United States*) (*Judgment of 27 June 2001*). Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 8 November 2005.

⁶⁴ See for example Quigley "LaGrand: A Challenge to the U.S. Judiciary" (2002) 27 *Yale. J. Int'l L.* 435 at 440.

⁶⁵ Held *at al* (1999) *Global Governance* 487.

player in the international arena. Now, globalisation has eroded the exclusive link between geography and political power, leaving the state as only one of the many subjects of international law. According to Guillaume,⁶⁶ the main result of globalisation is that states now play a smaller role in the traditional functions. This change has brought with it new architecture in international law with the recognition of institutions other than the state. Thus globalisation has accelerated the recognition of these non-state entities, thereby allowing a steady proliferation of players in the international field. The result has been that more supranational bodies have emerged in the last decade, such as courts, tribunals and other NGOs. In Europe, for instance, the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) has managed to convince national governments and individuals to engage in often-high stake adjudication at a level above the state.⁶⁷

As such, the state is no longer the sole advocate for international obligations, nor is it the sole beneficiary of any international privileges. Individuals, corporations and international organisations now have greater presence in international matters. This is significant for the purpose of this thesis because only states can be party to ICJ cases. But *LaGrand* demonstrates that the decision of the ICJ will not only impact states, but individuals as well. This then necessitates the involvement of national courts, which have the machinery to implement the benefits of any ICJ decisions for an individual.

2.2.3 Globalisation and international norms

The globalisation of international norms means these norms have now been absorbed into domestic jurisdictions. The death penalty is but one example of this. Countries that have chosen to retain this form of punishment have come under heavy criticism for doing so.⁶⁸ Even domestic transgressions now expose a country to international censure. Rwanda is an obvious example in this respect. The International Criminal

⁶⁶ Guillaume “*La Mondialisation et la Cour Internationale de Justice*” (2000) 2 *International law FORUM du droit international* at 242.

⁶⁷ Helfer and Slaughter “*Toward a Theory of Effective Supranational Adjudication*” (1997-1998) 107 *Yale. L. J* 276.

⁶⁸ See Babcock (2002) 15 *LJIL* 367.

Tribunal for Rwanda (ICTR) was set up with the sole purpose of prosecuting individuals responsible for the genocide and crimes against humanity committed in Rwanda in 1994.⁶⁹ Perhaps now, in the 21st century, this seems an obvious necessity, but when one considers that a decade ago this would not be possible, the progression of humanitarian norms can be better appreciated. This is a process that Udombana⁷⁰ describes as the globalisation of justice.

Whilst globalisation has enabled the individual to become a beneficiary of international rights, other writers view globalisation as a threat to human rights realisations. For example, Balasuriya⁷¹ defines globalisation as a capitalistic venture, with a prime objective to profit investors of capital. This definition by its very nature sets globalisation up as an opposing force and irreconcilable with human rights. As such, the writer concludes that globalisation is materialistic whilst human rights are individualistic and only attainable through individualistic measures. Thus Balasuriya⁷² says for human rights to be respected there should be primacy of the dignity of the person over the material realities. Globalisation, in its present neo-liberal capitalist form, not only perpetuates but aggravates inequalities. While recognising that market globalisation has the potential to create the situation described by Balasuriya, it would seem that at present, globalisation has worked to the benefit of the individual. For example, globalisation and its wave of interdependence have limited the exclusivity of statehood thereby emancipating the individual by allowing him/her to be a player in international law.⁷³ The proliferation of court systems and tribunals in the world now allows an individual to have standing to raise human rights violations.⁷⁴ These very positive moves have been spurred by globalisation.

⁶⁹ See the Internet site of the International Criminal Tribunal for Rwanda (accessed at <http://www.un.org/icttr/> on 12 August 2006).

⁷⁰ (2003) *Emory. Int'l L. J.* 55.

⁷¹ "Globalisation and Human Rights" (2000) 1 *Sri Lanka J. Int'l L.* 1 at 1-2.

⁷² *Ibid.*

⁷³ Udombana (2003) *Emory. Int'l L. J.* 58.

⁷⁴ On this point see Alford (2000) *Am Soc'y Int'l L. Proc.* 160 and Charney "Impact on the International Legal System of the Growth of International Courts and Tribunals" (1998-1999) 31 *N.Y.U.J. Int'l L. & Pol* 697.

The exact starting point or the end point of globalisation is not certain. What is certain, however, is that something extraordinary is taking place in the world and this increased interconnectedness changes the global framework. In response to this, international law as a discipline must change. This means the foundational ideologies that underpin international law must be modified if international law is to remain up to date and effective.⁷⁵

2.3 NATIONALISM AND INTERNATIONALISM

Newton's third law of motion; 'for everything there is an equal and opposite reaction', is still true in the context of today as it ever was. As globalisation has advanced and strengthened, so has nationalist sentiment; what some have referred to as the last kicks of a dying horse.⁷⁶ It can thus be expected that globalisation will be viewed as a threat to national independence and distinctiveness.⁷⁷ Nationalism has carried negative connotations because it was alleged to be the driving force of the atrocities of the last century so that internationalism (a concept that embraces universalistic principles) has emerged.⁷⁸ There is thus a perceived tension between nationalism, which advocates the cause of the local, and internationalism, which is seen as an appropriate response to globalisation, because it advances the common good.

These ideologies are important because they inform conclusions on what role international institutions should play in domestic structures and vice versa. Any discussion on the possibility of national courts becoming active enforcers of ICJ decisions will necessarily be informed by one or the other theory, or a variant of

⁷⁵ Schapiro (1999-2000) *N.Y.U.J.L & Pol* 572.

⁷⁶ See for example, Kaldor ("Nationalism and Globalisation" (2004) 10 (1/2) *Nations and Nationalism* 161-177), who writes that the current wave of nationalism is not evidence of the enduring nature of the idea, but a consequence of globalisation. She explains (at 166) that globalisation not only favours the interconnectedness of the world, but it also favours the disconnectedness of the nation state, which weakens the potential for nationalist ideology.

⁷⁷ See for instance, Smith *Nations and Nationalism in a Global Era* (1995), who suggests that nationalism is attractive as an ideology because it promises a 'collective immortality' that has helped to sustain many nations in an era of technological uniformity and corporate efficiency.

⁷⁸ Burley (1992) *Harv. Int'l L.J.* 399.

these.⁷⁹ The objective of this section is to evaluate the notion of internationalism (which is seen to be more in keeping with the wave of globalisation that is sweeping the world) as against the idea of nationalism. This view is advanced on the premise that the two cannot co-exist, because they are extremist notions.

2.3.1 Defining nationalism and internationalism

A logical starting point of the argument is to define the two notions of nationalism and internationalism. Nationalism can be understood as a mindset that promotes particularisation. Internationalism rests on three strands, one of which is the idea that international law supersedes domestic law.⁸⁰

Nationalism is synonymous in some circles with the selfish unilateral pursuit of self-interest, whilst internationalism is associated with a pursuit of the collective good.⁸¹ Such categorisations tend to present nationalism and internationalism as two worldviews at loggerheads with each other. However, from a given set of facts, both views can be seen in operation and there is not necessarily a victor. Take the following examples: the efforts of the Iraqi government in the Gulf war seemed to be an advancement of nationalism because they sought to incorporate Kuwait on the basis of ethnic connections.⁸² We then see efforts by international bodies to bring peace and settle the matter. In this case, the two notions appear to be operating simultaneously. Whilst the UN peacekeeping efforts are an example of internationalism, their efforts resulted in the preservation of a nation, thereby advancing nationalism. Another example is that of Haiti, a case bearing striking

⁷⁹ For example, Burley (1992) *Harv. Int'l L.J.* 393 argues that the geopolitical framework for the millennium is neither internationalism nor nationalism but liberal internationalism.

⁸⁰ Bradley "Breard, Our Dualist Constitution and the Internationalist Conception" (1999) 51 *Stan. L.Rev.* 529 at 539. According to Bradley, the other two strands are the idea that international law must always trump domestic law when the two conflict and that the federal governments' opportunity to enter into international obligations must be expanded.

⁸¹ Burley (1992) *Harv. Int'l L.J.* 586.

⁸² Insanally "Nationalism: No Longer a Domestic Dispute" (1993-1994) 26 *N.Y.U.J. Int'l L. & Pol.* 439 at 441-442.

resemblance to former Rhodesia.⁸³ In both cases some said the UN was promoting nationalist interests instead of opposing them. The two cases are similar in that in both instances, there was no cross-border effect of the internal issues, but the UN still intervened on the basis of 'a threat to peace'.⁸⁴ Nonetheless, this was perceived as meddling with matters of domestic jurisdiction. Hence it would seem that on one level the UN's intervention amounted to a protection of national interests, while it is also true that any external intervention has an element of anti-nationalism.

The argument for a balance between nationalism and internationalism is however optimistic and some may even go so far as to say it is unrealistic. Yet, it is shown above that international events cannot always be neatly compartmentalised. They are made up of a complex network of relations, which can at one time involve more than a single agenda. It would thus be fruitless to engage in endless debates about the evils of nationalism on the one hand or the victory of internationalism on the other. There is room for both in international law so that the advancement of internationalism should not be seen as the end of nationalism. Rather, it should be seen as an opportunity to balance out the implacable nationalism that was the driving force behind so many of the last century's horrors.

2.3.2 Internationalist model and the international rule of law

The international rule of law is as vague as the concept of the rule of law on a domestic level. It encapsulates the idea of a greater good of law, and all the desirable features of an international legal order.⁸⁵ The idea of an international rule of law has

⁸³ *Ibid.* A military operation was led into Haiti after a military coup occurred and the illegal de facto regime failed to comply with its obligations under a previous Security Council Resolution. There was evidence of system violations of civil liberties by the regime. The Security Council thus adopted a further Resolution (940 of 1994), permitting a multinational force to intervene and remove the illegal regime. For further reading see Damrosch, Glennon and Leigh "Agora: The 1994 U.S. Action in Haiti" (1995) 89 *Am. J. Int'l L* 58.

⁸⁴ Damrosch "Nationalism and Internationalism: The Wilsonian Legacy" (1993-1994) 26 *N.Y.U.J. Int'l L. & Pol.* 493 at 496.

⁸⁵ Mattius Kumm "The International Rule of Law and the Limits of the Internationalist Model" (2003-2004) *Va. J. Int'l L.* 21 who says the international rule of law locks in and destabilises liberal democracy at the same time. He explains that whilst the rule of law protects domestic groups by

been promoted by internationalists to the extent that it would justify national courts being active enforcers of international law.⁸⁶ Such internationalists say that national courts should enforce international law irrespective of what national law dictates.⁸⁷ Thus national courts should rule on matters of foreign affairs even without specific authorisation of the national political branches. This position, however attractive, is unrealistic insofar as it does not consider countervailing considerations that prevent national courts actively enforcing international decisions. For example, there are certain doctrines that may operate to prevent national courts taking on such a role: the doctrine of separation of powers and the political question doctrine (these are more closely discussed in Chapter 6 of this thesis). Internationalists argue however that if national courts have the clout to strike down legislation on the basis of international law, they should have the same clout to enforce international law.⁸⁸ However, this misses the point, which is that national courts in many democratic states are empowered to strike down legislation and can therefore do so without fear. On the issue of foreign policy, they incur greater risks since foreign affairs are often an executive prerogative.

So the internationalist model is one that promotes the role of national courts in international law on the grounds that there is need to promote and enforce the international rule of law. This greater good is thus shown as a justification for engaging in matters even without executive authorisation. The main adversary of the realisation of this ideal is nationalism, which rather than embracing the international values is often closed to them. Nationalism and internationalism are thus once again presented as two opposing forces, one supporting greater activism of national courts in international law and the other resisting such involvement.

limiting the executive's opportunity to claim prerogatives in matters of foreign affairs, it empowers the new political actors commensurately.

⁸⁶ Bradley (1999) *Stan. L.Rev.* 529.

⁸⁷ Kumm (2003-2004) *Va. J. Int'l L.* 21.

⁸⁸ Kumm (2003-2004) *Va. J. Int'l L.* 24.

2.3.4 Situating nationalism and internationalism

The attractiveness of nationalism lies in its promise of collective and territorial immortality, in an era where nations feel threatened by the social change being advanced by technological uniformity and corporate integration.⁸⁹ And yet in the age of globalisation it may be difficult to imagine how nationalism in its purest form can have a place in such an interconnected world. Slaughter suggests that what we should be striving for is a judicious mixture of both nationalism and internationalism.⁹⁰ Thus in the context of the current discussion, events should not be seen as proving the victory of nationalism over internationalism or vice versa, but as the interaction of both notions in a common field. Therefore in this section, it is contended that internationalism and nationalism need not always be seen as two opposing systems. Both ideologies can be seen to operate in international practice today.

It would thus seem that in the face of increased connectivity in the world, nationalism still continues. This is desirable because nationalism promotes individuality whereas globalisation may have the effect of creating uniformity. The co-existence of these two provides a better opportunity for the balance to be found. A balanced view of these two ideologies is important for our purposes because internationalists tend to argue for the enforcement of international law by national courts without specific authorisation by national political branches⁹¹, whilst nationalists tend to resist the advancement of international norms within their borders. History has shown that hardened nationalism serves little good. Nazi Germany is a clear example of this. It is argued that extremist internationalism can be equally as destructive, since it would erode an important aspect in the fabric of international law, state sovereignty. So an uncompromising view of internationalism is just as flawed as an uncompromising view of nationalism. What must be achieved is a balance of the two. According to Joseph Weiler⁹², the founding fathers of the European Union had such a vision. He

⁸⁹Kaldor (2004) *Nations and Nationalism* 161.

⁹⁰ Slaughter Burley 'Nationalism versus Internationalism: Another Look' (1993-1993) 26 *N. Y. U. J. Int'l L. & Pol* 585.

⁹¹ Kumm (2003-2004) *Va. J. Int'l L* 20.

⁹² See Slaughter Burley (1993-1993) 26 *N. Y. U. J. Int'l L. & Pol.* 586.

states that increasing the bonds between states that were previously war rivals was an effort to temper nationalist sentiment by reminding them that they all have a common heritage.

2.4 SOVEREIGNTY

The prevalent view in the West currently is that human rights provide legal and moral grounds for disregarding the sovereign rights of states.⁹³ This reflects the growing tendency to place greater emphasis on international values and a departure from the previous tendency to pull out the sovereignty card whenever there is potential for a greater involvement of international law in the domestic plane. Thus sovereignty as an ideal is today regarded in a different light. The purpose of this section is to consider the traditional understanding of sovereignty as seen against today's international law ethic. This will then shed light on the modern definition of sovereignty and its place in modern international legal theory.

2.4.1 The elusiveness of sovereignty

When attempting a study of sovereignty, it becomes apparent that the word does not in fact have any set meaning. In this sense it is akin to the term 'rule of law;' a term commonly used but rarely defined. The obscurity of the concept is so evident that even after extensive research, one is still left without clarity. Henkin⁹⁴ expresses his own frustration with the concept in the following words: 'I don't like the "S word." Its birth is illegitimate and it has not aged well. The meaning of sovereignty is confused and its uses are various, some of them unworthy, some of them even destructive of human values.' What is generally known about sovereignty is that to respect sovereignty is good but to intrude on a state's sovereignty is bad. This is perhaps the reason why Radon⁹⁵ suggests that sovereignty is nothing but a political emotion.

⁹³ Chopra & Weiss "Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention" (1992) 6 *Ethics & Int'l Aff.* 95.

⁹⁴ "The "S Word": Sovereignty and Globalization, and Human Rights, Et Cetera" (1999-2000) 68 *Fordham. L. Rev.* 1.

⁹⁵ "Sovereignty: A Political Emotion, Not a Concept" (2004) 40 *Stan. J. Int'l L.* 195.

The sovereignty argument is often raised in the face of a proposition for greater involvement of the international in the domestic. It is thus fitting that before the thesis considers the possibility of national courts being enforcers of international court decisions, the idea of sovereignty is first delineated.

2.4.2 Sovereignty as a foundational value in international law

State sovereignty is the foundation of international law and has been recognised from its birth.⁹⁶ This is clearly because at the formation of what can be recognised as an international framework, at the Peace of Westphalia, states were the only players in international law.⁹⁷ This is why the discipline was referred to as the Law of Nations. As far back as the 17th Century, Grotius⁹⁸ (who is often referred to as the father of modern international law) presupposed a territorial order in which states were free from outside control. Today such ideas are strengthened in the UN Charter.⁹⁹ According to Shen,¹⁰⁰ it is in the exercise of their sovereignty that states created international law. It has also been said that “Sovereignty is, doubtless, the most precious [right of a nation]... which other nations ought most scrupulously to respect.”¹⁰¹

The validity and effectiveness of international law depends on the continuing support of nation states, while the protection of national sovereignty and independence is contingent upon an effective international legal system founded on nation states. This idea has reigned from the Peace of Westphalia, where the concept of sovereignty was formally recognised, through the League of Nations to the United Nations, where it is

⁹⁶ Shen “National Sovereignty and Human Rights in a Positive Law context” (2000-2001) 26 *Brook. J. Int’l L.* 419 at 421.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Article 2(1) which indicates that the United Nations is based on the ‘principle of sovereign equality of all its members.’

¹⁰⁰ (2000-2001) *Brook. J. Int’l L.* 419.

¹⁰¹ Shen (2000-2001) *Brook. J. Int’l L.* 421.

now one of the founding tenets of the Charter.¹⁰² Shreueder¹⁰³ comments that contemporary international law presupposes a structure of co-equal sovereign states. So the way international law currently works is based on the presupposition that there are sovereign states as players in the field. Therefore it can be seen that sovereignty is not just something of academic interest, but is a central value in international law. As a result any changes to this foundational concept must not be treated lightly.

2.4.3 The Evolution of sovereignty

Sovereignty is a term that appears to have had different meanings at different points in history. For example, the early Catholic writers understood sovereignty to mean the delegation of a competence from a superior legal order.¹⁰⁴ The eighteenth century saw the adoption of ideas spearheaded by Vattel and Hegel. Vattel saw sovereignty as something possessed by a state that gave it the freedom to determine for itself the obligations imposed upon it.¹⁰⁵ This was later developed by Hegel who said the state was a metaphysical entity with value and significance in and of itself, thus having the will to choose whether it should or should not respect law.¹⁰⁶

The idea of sovereignty is thus historically seen as a claim to absolute territorial control. So Max Huber expresses the term sovereignty in *Island of Palmas*¹⁰⁷ case in the following way:

¹⁰² Starke "Monism and Dualism in the theory of International law" (1936) 17 *Brit. Y.B. Int'l L.* 66 at 67.

¹⁰³ "The Waning of the Sovereign State: Towards a New Paradigm for International Law" (1993) 4 *European Journal of International Law* at 448.

¹⁰⁴ Starke (1936) *Brit. Y.B. Int'l L.* 68.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ 2 RIAA 829 (1928) at 838.

‘Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is a right to exercise therein, to the exclusion of any other state, the function of a state’.¹⁰⁸

It was this foundation that allowed the European monarchs to create absolute states.¹⁰⁹ This notion of sovereignty as absolute control survived the French and U.S. revolutions. The major change that came with the revolutions was a shift in power from the hands of the monarchs to the people. Challenges to this traditional idea of sovereignty only began to surface after the Industrial Revolution and the World Wars, with the birth of a true international framework.¹¹⁰ So there are some who define sovereignty according to its limits. For example, Starke¹¹¹ says that sovereignty is only a competence that states enjoy within the limits of international law.

At the same time, the United Nations emerged as the organising body of the international legal order and many states sought membership of the body.¹¹² In order to do so, there was a need to surrender some of their internal control. This was however not seen as a negation of their sovereignty, but an affirmation of it. A new idea of sovereignty thus emerged. Instead of trying to defend their sovereignty through ‘leave us alone’ strategies, they sought UN membership to prove their sovereignty. The fact that this recognition placed constraints on their power to do whatsoever they wish did not seem to matter. This same view of sovereignty can be seen at work today in the European community, where the member states yield some of their international control to achieve unity in the community. (This is expanded upon in Chapter 6 of the thesis.)¹¹³ For the purposes of this thesis it is useful to

¹⁰⁸ Dugard *International law: A South African Perspective* 2 ed (2001) page number. Ref for case..

¹⁰⁹ Jenik Radon “Sovereignty: A Political Emotion, Not a Concept” (2004) 40 *Stan. J. Int’l L.* 195 at 196. He also shows that the idea of sovereignty as complete control took root even in the imagination of leading philosophers. For example, Hobbes in the 17th century reasoned that anything less than absolute power would be insufficient to satisfy a single ruler.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Radon (2004) *Stan. J. Int’l L.* pg

¹¹³ Some of the smaller states in the European Community saw membership in the EU as not just a conformation of their recognition or sovereignty, but as an expansion of that sovereignty. For instance Estonia and other Baltic states voluntarily sought access to the EU to protect their sovereignty and

discuss the evolution of the concept of sovereignty from its origins in the Peace of Westphalia to contemporary international law, where the work of globalisation is clearly visible.

2.4.3.1 The Westphalian idea of Sovereignty

The traditional Westphalian idea of sovereignty is the right to be let alone or the right to be free from external interference.¹¹⁴ The outworking of this understanding of sovereignty can be seen in Article 2(7) of the UN Charter, which prohibits the UN from intervening in matters essentially within the domestic jurisdiction of a state.

The Nuremberg trials had a major effect on the concept of state sovereignty. On one level it showed that individuals have rights that state action cannot jeopardise, and on another level it showed that individuals have obligations under international law, which may contradict state authority.¹¹⁵ As such it did away with any the view that sovereignty was a concept that gave the state *carte blanche* to do whatsoever it deems fit and highlighted the fact that there is a loyalty to humanity that goes beyond the loyalty to one's nation.¹¹⁶

Weeramantry¹¹⁷ writes that in the years immediately after the war, there was less fear of international law and over the years the barriers to advancement in the global order have lifted. He lists the following obstacles as examples: pessimism regarding world organisation, impenetrability of walls of sovereignty; and the negative views of the League of Nations.

remain free from Russia (see Askel Kirch *et al* 'Changes in EU-Consciousness in Estonia 1995-2002: Discussion and Public Opinion (IES Proceedings, Nov 2002). Accessed at <http://www.ies.ee/iesp/kirch.pdf> on 20 November 2005).

¹¹⁴ Slaughter "Sovereignty and Power in a Networked World Order" (2004) *Stan. J. Int'l L.* 283 at 284.

¹¹⁵ Henry T. King Jr. "Nuremberg and Sovereignty" (1996) 28 *Case W. Res. J. Int'l L.* 135 at 137.

¹¹⁶ Weeramantry "Emerging Dimensions of Sovereignty under International Law" (1991) 3 *Sri Lanka. J. Int'l L.* 1 at 25.

¹¹⁷ (1991) 3 *Sri Lanka. J. Int'l L.* 3.

This idea has been challenged by the growing interdependence of the world and a host of factors that are classed under the rubric of globalisation. Sovereignty in this sense is today seen as ineffective because a state is no longer able to provide economic stability and security to its citizens free of international intervention.¹¹⁸ Thus the economic inter-dependence brought by globalisation has rendered the Westphalian idea of sovereignty obsolete.¹¹⁹ Additionally, the human rights movement has said intervention is justified when it is done in the name of human rights. This has ensured the slow and steady death of sovereignty, in the Westphalian sense.

2.4.3.2 Contemporary Sovereignty

According to Chayes and Handler Chayes, the international community has become a “tightly woven fabric of international agreements, organizations and institutions”.¹²⁰ As such it is characterised by connection, not separation, and in such a setting sovereignty as autonomy does not make sense. As a result, a new idea has graced the international legal stage that signals the end of the Westphalian State, and it is said that this passing is by no means regrettable.¹²¹ It is said that the EU is an example of a system that goes beyond the traditional idea of sovereignty and raises challenges for the old Westphalian idea of sovereignty.

Contemporary sovereignty remains uncertain, but an overview of legal theory shows that the running theme in all definitions is the recognition of a territory as a state in international affairs as opposed to a right to be ‘left alone’.¹²² The common premise in all these different definitions is that sovereignty is no longer associated with internal domestic control and the ‘leave us alone’ dogma. It is now better understood as the

¹¹⁸ Slaughter (2004) *Stan.J. Int'l L.* 409 says that ‘states can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states’ affairs.

¹¹⁹ *Ibid.* This was the view of some legal theorists even before globalisation became evident. For instance Richard Falk said: ‘sovereignty is as morally obsolete as it is factually inaccurate’ (Van der Vyver (1991) *Emory Int'l L. Rev* 321).

¹²⁰ Chayes and Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) at 4.

¹²¹ McCormick ‘Beyond the Sovereign State’ (1993) 56 *Mod. L.R.* 1.

¹²² See Slaughter (2004) *Stan. J. Int'l L.* 286.

characteristic that allows a state to be a player in the international field. The impetus for this development has been the changes in the global community that can be classified under the broader term of globalisation. Weeramantry¹²³ identifies some of these factors: the broadening cultural base of the international world, the development of Nuremburg principles, the communications revolution, increasing consensus in the world and alternative problem solving frameworks. These factors can all be classified under the broader term of 'globalisation'. So once again, it can be seen that globalisation has led to the redefining of traditional international law values. The old sovereignty has not stood the test of globalisation because it is founded upon the autonomy of the state, which has been eroded by increased interventionist policies and treaty obligations.

Koskenniemi¹²⁴ shows that there are two reigning theories on sovereignty: one moral and the other sociological. The moral view says that sovereign states strengthen the idea of national egoism that has been the root of the cataclysms of the last century. Their response is that there should be a move to a more global conception of justice. The sociological view suggests that global capitalism does not allow for factual independence, making actual sovereignty a tenuous fiction.¹²⁵ The logical endpoint of the sociological theory is to support the increased role of international institutions in domestic law. Thus theories have emerged that attempt to limit sovereignty; for instance the idea that states restrict their sovereignty to the extent that they agree to some bilateral norms by way of treaties.

The U.N. Charter provides that signatories consent to the Security Council having the power to intervene or permit intervention where domestic or interstate human rights situations are found to constitute an act of aggression, or a threat to or breach of international peace.¹²⁶ And yet the predecessor of the ICJ, the Permanent Court of International Justice, in *SS Wimbeldon*¹²⁷ case declined to hold that a state, in

¹²³ (1991) 3 *Sri Lanka. J. Int'l L.* 14-15.

¹²⁴ 'The Future of Statehood' (1991) 32 *Harv. Int'l L. J.* 397.

¹²⁵ Shreuder (1993) *EJIL* 402.

¹²⁶ Article 24(1).

¹²⁷ 1923 PCIJ (Ser.A) No 1 at 25.

concluding a treaty by which it undertakes to perform certain obligations, abandons its sovereignty, since the right to enter into agreements is an attribute of state sovereignty. Perhaps this is indicative of the fact that the distinction remains an academic one with little practical application.

Slaughter¹²⁸ says that sovereignty is interactive and not insular, which means it refers not to the right to resist, but the right to engage. She further develops her thesis by adding that if sovereignty is understood as conferring power to act then it is not just the state that is sovereign. She suggests that sovereignty should be devolved onto all state actors, including judges, legislators and ministers. These components of the state thus have the right to engage in matters of international law; they are thus deemed sovereign.¹²⁹ If this argument is accepted, a court is sovereign in the sense that it has power to act. It would then follow that it possesses the measure of independence that will allow it to be active with other courts across borders. In other words, such a view of sovereignty easily supports a more active role for courts in the international arena and vice versa. As attractive as this seems, there are some gross flaws with the proposition. If national courts were to act independently of the other state actors, establishing consistent policies could be highly problematic. In addition, foreign policy decisions are often seen as the prerogative of the executive, which means the national courts will be in violation of the separation of powers if they are to act. A further problem with the proposition is that on a practical level, it is unlikely that national courts would take any such action. The disciplines of international law and politics are inextricably linked. As a result many national judges feel ill-equipped to rule on such matters.

A better definition of sovereignty is Kahn's definition that identifies two forms of sovereignty: positive and negative.¹³⁰ He says negative sovereignty defines the boundaries that protect one state from the intervention of the other, whilst positive

¹²⁸ (2004) *Stan. J.Int'l L.* 284.

¹²⁹ Slaughter (2004) *Stan. J. Int'l L* 325.

¹³⁰ Kahn "The Question of Sovereignty" (2004) 40 *Stan. J. Int'l L.* 259.

sovereignty has to do with the right to form a concept of the self.¹³¹ The former thus has to do with the right to be left alone, whilst the latter is an appeal for the right to self-govern. He states further that negative sovereignty in international law is lagging behind the changing reality of positive sovereignty.¹³²

It is clear that the Westphalian idea of sovereignty is misplaced in today's globalised world. But there is an element of truth in the definition that must be retained. It is my opinion that every state must be allowed a measure of autonomy, otherwise there would be reason to fear a world government. Yet at the same time, such autonomy must be accompanied by a realisation that the state is not completely independent of other states and may have to account for its actions in certain cases to other states.

2.4.4 Sovereignty situated

The new idea of sovereignty therefore indicates the ability of the state to operate as an actor in the international realm. Any idea that goes against this new definition of sovereignty is criticised by the international community. For example, the United States foreign policy has recently come under the spotlight for this very issue. The United States idea of sovereignty is one that equates sovereignty with democracy¹³³ and thus resists outside interference. It has been said that this worldview of sovereignty is manifested in the American position toward international institutions. The U.S. entrance into certain international agreement was met with much criticism on the basis that it was a surrender of U.S. sovereignty.¹³⁴ Even the trilogy of cases that are the subject of this thesis show the same demand for self-government when the U.S. national courts refused to grant a stay of execution on the strength of an order by the ICJ.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Radon (2004) *Stan. J. Int'l L* 202.

¹³⁴ See for example Buchanan "A European Assault on U.S. Sovereignty" (accessed at <http://www.buchanan.org/pa-97-0318.html> on 25 November 2005).

Sovereignty must thus be understood against the backdrop of the current international culture; one in which the individual is depoliticised (meaning that the individual is defined by factors other than political borders) and in which the economic market envisages a single global market where political divisions are irrelevant.¹³⁵ It has been shown that the definition of sovereignty has important consequences for domestic and international policy. The classical era understood sovereignty as unbounded authority and in turn this led to a legal order organised around non-intervention and consent.¹³⁶ Today, the meaning leans in the opposite direction: sovereignty is more likely to be understood as the right to partake in transnational affairs because the world has become more interdependent.¹³⁷ If sovereignty is understood in this way, it cannot be argued on the basis of sovereignty that the ICJ should not play a greater role in domestic legal proceedings. In the same vein, sovereignty cannot be a reason not to use the machinery of national courts to enforce ICJ decisions.

2.5 THE THEORIES OF MONISM AND DUALISM

Sovereignty is thus the characteristic of a state that allows it to exist and be recognised as a player in international law. Starke¹³⁸ shows that the history of sovereignty has more to do with the relationship of the state to other normative orders such as international law. It is thus not a mere characteristic of a state, but one that allows it to interact with others. This thesis thus deals with how the components of these sovereign states interact with each other. The question of what a national court can and cannot do when international matters are brought before it is usually followed by theories on the proper relationship between international law and national law. The purpose of this section is to discuss these theories. The section will not only consider the arguments of the protagonists, but also the general practice of states will be used to draw certain conclusions about the dichotomy.

¹³⁵ Kahn "Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order" (2000) 1 *Chi. J. Int'l L.* 1 at 6.

¹³⁶ Kahn (2004) 40 *Stan. J.Int'l L.* 259.

¹³⁷ *Ibid.*

¹³⁸ (1936) *Brit. Y.B. Int'l L.* 17.

Any conclusion about the role of international decisions in municipal proceedings must logically begin with an acceptance of certain truths about the relationship between international law and domestic law. As such the following questions are asked: are international law and municipal law concomitant aspects of the same juridical reality or are they distinct normative realities,¹³⁹ and which system stands higher in the legal hierarchy?

2.5.1 The monist and dualist views

There are two well recognised theories that explain the relationship between international law and domestic law: the monist school and the dualist school, each having its own presuppositions. Monists generally regard international law and municipal law as manifestations of a single conception of law, thereby arguing that municipal courts are obliged to apply rules of international law directly.¹⁴⁰ Dualists on the other hand argue that international law and municipal law are two different conceptions of law and if municipal law courts are to apply international law, it must first be adopted into local law by legislation.¹⁴¹ The dualist theory is founded on the premise that states are sovereign and therefore boundaries are important. This class of theorists view the fact that international law and domestic law regulate different subjects as evidence of the distinction between international law and municipal law. States are subjects of international law, whereas individuals are the subjects of municipal law.¹⁴² Based on this foundation, it can be seen that where a conflict arises between the two systems, the dualist would say that municipal courts cannot be considered to be bound by international law unless a law has first been adopted into domestic law. As such, where international law and municipal law conflict, the court must apply the latter. Some monists argue the opposite: that international law defines

¹³⁹ *Ibid.*

¹⁴⁰ Dugard *International law* 43.

¹⁴¹ *Ibid.*

¹⁴² Starke *Introduction to international law* 10th ed (1989) 72.

the boundaries and jurisdiction of municipal law; therefore it is evidence of international law being the higher law.¹⁴³ Other monists argue that it is in fact municipal law that is the higher of the two because state actors operate within municipal law, while the international regulates the external.

The above theories form the substance of a longstanding debate that remains unresolved. They are thus important insofar as they shed light on the presupposition of any perspective of international law. So, for instance, they are useful in that they enable one to look at a particular instrument, like a constitution for example, and determine whether it is dualist or monist. This conclusion then reveals the fundamental presuppositions of the drafters of that instrument. Starke¹⁴⁴ suggests that a strictly theoretical perspective of theories of international law is of utmost importance. Brownlie,¹⁴⁵ however, whilst recognising the importance of the monist and dualist debate, suggests that a more informative route to take is to analyse the practice of states. He writes that that if one analyses the practice of international law, a realisation will emerge that the conflict between international law and municipal law is more heightened than in reality, since international practice has found in many, although not all situations, a means to resolve any conflicts between the two systems.¹⁴⁶ It must be pointed out that Starke was writing in 1936; before the rapid development of international law through the United Nations took place. It would thus make sense that he places a theoretical framework at the fore because the practice of international law was not as widespread as today. The context has shifted significantly since then. The recurrent theme through this chapter has been the rapid development of international law as a discipline mainly due to globalisation. It is thus possible to discuss the nature of the relationship between international law and national law by looking at the general practices of states. It is in this sense that Brownlie is correct in

¹⁴³ Levi *Contemporary International law A Concise Introduction* 2nd ed (1991) 23.

¹⁴⁴ (1936) *Brit. Y.B. Int'l L* 66.

¹⁴⁵ I Brownlie *Public International Law* 15.

¹⁴⁶ *Ibid.*

considering this the more fruitful route to take in discussing the international law municipal law dichotomy.¹⁴⁷

2.5.2 Escaping the debate

The issue of the relationship between municipal and international law is thus not merely a matter of theory, but also a matter of practice. Many theorists have attempted to escape the monist-dualist dichotomy, saying it conflicts with the way international and national courts behave.¹⁴⁸ For instance, Fitzmaurice¹⁴⁹ challenges the starting blocks of these theories: that there is one common field in which they both operate. He argues that international law and municipal law do not in fact operate in a common field and as such the question of which is master does not arise.¹⁵⁰ According to Fitzmaurice the controversy is artificial, unreal and beside the point. He says the entire controversy rests on the premise that there is a common field in which international law and municipal law vie for supremacy. In his opinion, the two systems operate in different fields.¹⁵¹ To try to compare them would be akin trying to decide which the master is: Australian law or English law, when each is master in its own sphere. He denies that the two systems can formally conflict as **systems**, since national law cannot be a rival to international law in the international field.¹⁵² He however finds that conflict can arise between **obligations**, for example the inability of a state to act on a domestic plane in conformity with its international obligations. When such conflict occurs, he proposes that it will be settled as a matter of domestic law and not international law, because each state will have its own conflict of law

¹⁴⁷ Conforti "Notes on the Relationship between international Law and National Law" (2001) 3 *International Law FORUM du Droit International* at 18), writing on the relationship between international law and national law, states that when discussing the incorporation of international legal rules into domestic law, it is not a question of adopting a monist or dualist approach. He goes on to explain that such theories should be left in the hands of philosophers since they have no practical implications.

¹⁴⁸ Brownlie *Public International Law* 15.

¹⁴⁹ "The General Principles of International Law Considered from the Stand Point of the Rule of Law" (1957-11) 92 *Hague Recueil* at 70-80.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

rules.¹⁵³ For instance, in the United Kingdom it has been settled in terms of *Triquet v Bath*¹⁵⁴ that customary international law is automatically regarded as part of municipal law, without need for a national court decision in each particular case. Likewise, the status of international treaties is also settled in most states.

Thus the monist/dualist arguments can only be of significance if as a first step there is consensus that we are dealing with a common field. But such a field does not in fact exist, and this is well demonstrated by the fact that the subjects of international law and domestic law are different. Fitzmaurice thus presents a hybrid of the two theories that goes a long way to giving a practical edge to the monist/dualist debate. Fitzmaurice's idea is quite like the harmonization theory which seeks to achieve a harmony between international and national law.¹⁵⁵ For example, according to the harmonisation theory where a judge is faced with a conflict between international and national law, he must apply the rules of his jurisdiction. In this way, international law is applied directly in national law, except where it is contrary to that state's laws.¹⁵⁶ Fitzmaurice's answer to the conflict in *LaGrand* would be that it is not a question of monism or dualism. Rather, the answer lies in examining the rules that exist to deal with such conflicts.

The monist/dualist arguments are thus not irrelevant. They capture elements of a complex reality, but in order to be useful, they must be discussed alongside the general practice of states in international law.

2.5.3 State Practice regarding the International and Municipal law Dichotomy

It is possible to determine whether a state is monist or dualist by looking at the values embraced by that state, for instance in a Constitution. In the same way, it is possible to determine if internal law or international law should prevail in any given situation by paying due regard to international legal principles. This section will discuss certain

¹⁵³ Starke (1936) *Brit. Y.B. Int'l L* 66.

¹⁵⁴ (1764) 3 Burr. 1478. Court of King's Bench.

¹⁵⁵ Dugard *International law* 48.

¹⁵⁶ *Ibid.*

principles drawn from international case law and legal theory that are established rules showing how the international and domestic divide must be treated. Only those principles that inform the subject of this thesis will be discussed.

2.5.3.1 The illegality argument

Conflict arises when there is a contradiction between state law and international obligation; for instance, if in order to obey an international obligation, a state has to act contrary to its national law. There is, however, a well established principle that a state cannot plead the provisions of its own law in answer to a claim against it for an alleged breach of international law.¹⁵⁷ International jurisprudence has been consistent in this regard, holding the same from the 1930s¹⁵⁸ to date.¹⁵⁹ This is clearly demonstrated in *LaGrand*. One of the barriers in US domestic law to the realisation of the rights of a detained person under Article 36 of the VCCR is the procedural default rule.¹⁶⁰ The ICJ thus ruled that the application of the procedural default rule in the face of a challenge on the basis of Article 36 was a violation of the VCCR.¹⁶¹ The ICJ decision thus turned on the principle that the existence of a contradictory internal law does not excuse the state from performing its international obligations undertaken by treaty.

The above rule can be classified as monist. It appears to suggest that international law is supreme since the rule appears to require that international practice be opted over municipal practice. However, this is misleading. This rule should be understood as a principle and not the absolute order of international law trumping municipal law. There are no sources, be it in literature or legislation that provide for a concrete duty to bring internal laws in conformity with international obligations.¹⁶² Instead, a state

¹⁵⁷ Article 27 in the Vienna Convention on the Law of Treaties 1969.

¹⁵⁸ *Free Zones Case* (1932) PCIJ Ser. A/B, no 46 at 167.

¹⁵⁹ See *LaGrand* (Judgment of 27 June 2001). Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 6 November 2005.

¹⁶⁰ See *LaGrand* (Judgment of 27 June 2001) at para 90.

¹⁶¹ *Ibid.*

¹⁶² Starke (1936) *Brit. Y.B. Int'l L* 35, Fitzmaurice (1957-11) 92 Hague Recueil 89.

will be called to opt for international law where it has an **obligation** to do so. Thus, if a state fails to observe a particular international obligation, on a particular occasion, it is obliged to adhere to its international obligation, not because international law is supreme over municipal law, but because of the principle of *pacta sunt servanda* (promises must be kept). Such a state cannot seek to avert its obligation on the basis of a conflicting internal rule. This rule thus shows that it is not the supremacy of international law or domestic law that determines the outcome of any given case; rather, it is the obligations that are important. A picture is painted then, not of two systems, each vying for supremacy as suggested by the monism dualism debate; but of the supremacy of adhering to international obligations.

2.5.3.2 *Res Judicata and Stare Decisis in international law*

In addition to the above, *res judicata* has no effect from a decision of a municipal court to the ICJ or vice versa. The reason is simply because the two systems often deal with issues that are very different. So for instance in *LaGrand* it was not the accuracy of the conviction and sentence that were at issue. Rather, it was the violation of the internationally protected rights of the detained individuals. Suppose a system of *res judicata* did apply as between the two systems, so that once a matter had been settled on a municipal level it could not be revisited on an international plane. One could then conclude that there is a common field in which international law and municipal law operate. But this is not the case. This international rule creates a picture of two systems that exist in separate fields having dominion in separate fields.¹⁶³

It would seem that this is the recognised order, because the ICJ statute provides that its decisions are binding only on the parties to the case and no further.¹⁶⁴ There is thus no doctrine of *stare decisis* operating between the ICJ and national courts and this tends to point to two separate systems that exist and not one.

¹⁶³ Fitzmaurice *ibid*.

¹⁶⁴ See Article 59 of the ICJ Statute.

2.5.3.3 Position of treaty obligations in U.S. domestic law

Article IV (2) in the U.S. constitution declares that treaties will be the supreme law of the land alongside the constitution and the laws in the U.S. made in pursuance of the constitution. This section thus has the effect of incorporating international law into domestic law. But U.S. law distinguishes between self-executing and non-self executing treaties. The former is a treaty that may be enforced by courts without the prior legislation by congress and the latter is conversely a treaty that may not be enforced by a court without prior legislation.

Through this system the U.S. has managed to reconcile their international and internal legal obligations, so avoiding the problem of determining which system of law applies and when. Therefore, conflict in international law rule and the internal legal rules is limited. So in the Head Money cases: *Edye v Robertson*¹⁶⁵, when an Act of congress (internal law) was contested on the basis that it conflicted with an earlier treaty (international law), this rule aided the resolution of the issue. The court found no such conflict, but held that a treaty was as much the law of the land as any act of congress. Thus future courts will be aware not to disregard treaty obligations on the basis that an act of congress is in conflict with the treaty. This is important because the status of the Vienna Convention on Consular Relations (VCCR) in the U.S. is significant to deciding what role the courts can play in the realisation of the ICJ decision. If it is found that the VCCR is self-executing, then the U.S. national courts have the power to at least consider the implementing the decision of the ICJ in *LaGrand* without legislative input.

Many countries employ the same practice of reconciling the norms of the two international systems, not as overtly as the U.S. but through interpretation. In France, Netherlands, Austria, Luxembourg and Switzerland, treaties are automatically incorporated into domestic law provided that the treaty has been duly approved by the legislature.¹⁶⁶

¹⁶⁵ 112 U.S. 580 (1884). U.S. Supreme Court.

¹⁶⁶ Dixon and McCorquodale *Cases and Materials* 123.

2.6 CHAPTER CONCLUSION

This chapter has analysed selected theories of international law and considered the impact of globalisation on these areas. The chapter has shown that globalisation has both signalled and spurred many changes in international legal theory. In response to this, international legal theorists and practitioners have grown increasingly dissatisfied with theories that do not reflect international norms. The notion that globalisation will do away with nationalist sentiment is uncertain. What is certain, however, is that internationalism is advancing at a rapid pace, as it is seen to be better in keeping with globalisation. The chapter also demonstrated that the meaning of sovereignty has evolved from its creation at the Peace of Westphalia to the current globalised world. It was said that globalisation has brought increased connections between states and therefore sovereignty as autonomy is no longer relevant. Finally, the theories of monism and dualism were analysed. While recognising their significance in the formation of much of the current legal practice, it was said that focusing on the behaviours of states is a more informative way of understanding the relationship between international law and domestic law.

The above theories are all significant to the current research because much of the legal theory that promotes greater co-operation between international courts is motivated by modern interpretations of traditional theories. The literature is thus often either internationalist in its approach, or it resists internationalist sentiment. Whatever one's take may be on the issue, there are two notable considerations that must be emphasised. Firstly, international society has changed from autonomy to interaction and theories must still retain their ability to explain state behaviour in this context. Secondly, as attractive as internationalist theories may be, caution must be exercised to avoid idealistic propositions that do not consider the politics of international law. A balanced reaction is thus required that neither disregards individuality by calling for complete assimilation nor resists integration by absolutising sovereignty and nationalism.

It was argued that when trying to determine the relationship between international law and municipal law, more particularly whether a given country should apply an

international law rule, the monist-dualist debate need not be revisited. Rather, a more enlightening way to consider the relationship between international law and domestic law is to pay regard to the practice of states since international law practice has developed sufficiently to draw conclusions about the dichotomy from practice and not theory. It was also shown that the fundamental presupposition of sovereignty as a doctrine has consequences insofar as the ideas outwork themselves in a country's policies and behaviour. As such, the importance of correct understanding of this doctrine is put forward as neither absolute nor non-existing. Sovereignty should thus be seen in the balance: a concept that empowers a state to act and yet one that is subject to limitations. In a community where human rights realisations are the focal point, it is important that the correct view of sovereignty be entrenched to allow international input. It was also shown that internationalisation and nationalisation are still two reigning theories in international law and globalisation is not necessarily indicative of the waning of nationalisation. This means for the purposes of this paper, when making proposals, particularly for increased interaction of international institutions in national law, nationalism may still be considered as a barrier to this innovation.

Finally, whether one considers the changes brought by globalisation to be positive or negative, there can be no question that something extraordinary is happening in the world. In consequence, this requires a shift in international legal academia. system is to remain relevant and up to date.

CHAPTER 3

THE INTERNATIONAL COURT OF JUSTICE AS AN INSTITUTION FOR DISPUTE RESOLUTION

Contents

- 1 *Introduction*
 - 2 *The Structure of the Court*
 - 3 *Role of the Court in International law*
 - 4 *Enforcement procedures*
 - 5 *Evaluating the Court*
 - 6 *Conclusion*
-

3.1 INTRODUCTION

Shaw¹⁶⁷ begins his discussion on the ICJ by pointing out that the court can be viewed from numerous perspectives. It may be viewed through the eyes of an academic, a practitioner, a state, an international organisation or even an individual. Whatever perspective one chooses will determine the manifestation of one's argument, that is to say the vantage point taken will determine the outcome of the analysis. For instance: an academic perspective may commend the court on the basis that it is a good ideal, whereas the practitioner may criticise the court on the same grounds arguing that it is just an ideal that cannot be grounded in reality and practice. This chapter will not present the discussion from any singular perspective. The chapter will show a melange of ideas, from the academic and the statesman to the practitioner, in an attempt to analyse the court from these various perspectives.

¹⁶⁷ Shaw "The International Court of Justice: A Practical Perspective" (1997) 46 *I.C.L.Q.* 831.

On evaluating the success or the efficacy of the ICJ it would seem that the logical departure point is to look at the compliance rate with the Court's decisions. However, the evaluation goes further than that. If the aim of the ICJ is to settle disputes, then that must be the measuring point. The chapter will show examples of cases where there has not necessarily been compliance with ICJ decisions, but peace has nonetheless ensued due to a decision of the ICJ.¹⁶⁸

The chapter begins with a brief historical outline, as this will be useful in evaluating the development of the court as an institution in international law. The focus will then be shifted to the powers and functions of the court, drawn out from the various statutes applicable, including the ICJ's own enabling statute, the UN Charter and various *obiter dicta* elucidated from ICJ jurisprudence. This will become important as a foundation for later chapters, in which an attempt will be made to consider whether the court can play a more significant role in domestic proceedings without overstepping its mandate. The chapter then shows how the court has developed and evolved from a last resort mechanism in international law to a useful and well-utilised method of dispute resolution in more recent times. It illustrates how the court functions on many levels to resolve disputes while showing the court's potential to expand its role in international dispute resolution. Finally, the strengths and the weaknesses of the court will be brought to the fore, as this will influence a later discussion on the court's ability to develop international law.

¹⁶⁸ For instance the cases of *Nauru v Australia* (Certain Phosphate Lands in Nauru (*Nauru v Australia*) 1992 ICJ 345, 346 (June 29)) and the case of *Finland v Denmark* (Passage through the Great Belt (*Finland v Denmark*) 1992 ICJ 348 (Sept 10)). In both these cases the dispute was eventually settled out of court but it was the intervention of the court that made such a settlement possible.

3.2 THE STRUCTURE OF THE COURT

3.2.1 Historical background

On 24 August 1898, an event occurred that has been termed a golden moment in the history of international justice.¹⁶⁹ Czar Nicholas II, in addressing the sovereigns of Europe, handed them a written statement whose content was to the effect that war as a means of resolving disputes was outmoded and should be superseded by more peaceful methods of resolving disputes. Today, this statement would not be out of place in a world that values peaceful dispute resolution. However, the 19th Century was a century of war, where the reigning worldview was that war is “a natural extension of diplomacy and the great resolver of international disputes: the sword and not the law”.¹⁷⁰ Set in context, the Czar’s statement was indeed an unusual and groundbreaking statement, magnified by the fact that it was coming from the sovereign of the world’s largest military power at the time. It was in response to this statement that the great Peace Conference of 1899 took place at The Hague.¹⁷¹

The impetus to create a world court developed as a result of the Hague conferences that took place in 1899 and 1907.¹⁷² Flowing from these conferences, a Permanent Court of Arbitration arose, which attempted the consolidation of an international legal system. However, it was only in 1920, after World War I, that any significant development took place. A general feeling prevailed at the time that the horrors of war prompted greater optimism for the idea of peaceful resolution through the mechanism of an international court. The Permanent Court of International Justice (PCIJ) was thus created.¹⁷³ This court aimed to prevent outbreaks of violence by facilitating easily accessible methods of peaceful dispute resolution. The court had all the apparel of a court: a permanent panel of judges, continuous jurisprudence, a

¹⁶⁹ An address by Weeramantry “The World Court: Its Conception, Constitution and Contribution” (1994) 20 *Monash Univ LR* 181.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Shaw *International Law* 3 ed (1991) 657.

¹⁷³ *Ibid.*

registry, and its own rules of procedure.¹⁷⁴ Yet its greatest weakness was that it was not an integral part of the League of Nations. This was a weakness because it meant the PCIJ was not an integral part of the international system and members of the League of Nations were not automatically members of the PCIJ.

After World War II, the ICJ was then created, as an integral part of the United Nations. This court functioned on the basis of an almost identical statute as its predecessor. However, a dramatic difference between the two courts is the environment in which they functioned.¹⁷⁵ Weeramantry, in his address on the occasion of the inaugural 'Governor's forum' in Melbourne, points out that the international law of the 19th century emphasised the individualist concept of state sovereignty, whilst the international law of the 20th century emphasised the collective duties of states and the interdependence of states.¹⁷⁶ This means that the ICJ today functions in a very different setting. For example, the UN has adopted preventative diplomacy, which functions largely on public conferences, and as such the ICJ is seen as a judicial extension of UN diplomatic policy.¹⁷⁷

3.2.2 Composition of the court

The court is composed of 15 members, elected by the General Assembly and Security Council from a list of qualified persons drawn up by the Permanent Court of Arbitration (PCA).¹⁷⁸ The election process is designed to minimise political pressures and it takes place once every three years, with five judges being appointed at a time. This staggered process thus ensures continuity in the court. The judges are elected "regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international

¹⁷⁴ Weeramantry 1994 *Monash Univ LR* 186.

¹⁷⁵ *Ibid.*

¹⁷⁶ Weeramantry 1994 *Monash Univ LR* 187.

¹⁷⁷ *Ibid.*

¹⁷⁸ Art. 4 and 5 of the ICJ Statute.

law”.¹⁷⁹ The members of the court are elected for nine years and may be re-elected. No two successful candidates may be of the same nationality. The framework is thus set for a judicial body of independent members rather than state representatives.¹⁸⁰

3.2.3 Powers and Functions

The International Court rests upon two streams of legitimacy. Firstly, it is the UN’s premier judicial organ¹⁸¹ and as such it possesses a responsibility to the United Nations and should function not only in accordance with its own enabling statute, but in accordance with the provisions of the UN Charter. Its second leg of legitimacy rests on its role in the wider international community. According to Judge Lachs, the court is “the guardian of legality for the international community as a whole, both within and without the United Nations”.¹⁸²

The jurisdiction of the ICJ is founded on consent.¹⁸³ This makes it a very different system to a domestic court, which is the root cause for a sentiment that the ICJ has a weak structure. There are various sections that allow the court jurisdiction over a matter. Firstly, in terms of article 34 of the ICJ Statute, the court has jurisdiction in disputes involving only states and not individuals.¹⁸⁴ In such a case the court has jurisdiction by consent. This is where two states, by special agreement, concede to abide by the court’s decision. On the basis of the same article, the court has jurisdiction over a dispute based on a treaty, if that treaty gives the court jurisdiction. Secondly, Article 36(2) provides for compulsory jurisdiction. States accept the compulsory jurisdiction of the court by filing in advance recognition of the

¹⁷⁹ Art. 2 of the ICJ Statute.

¹⁸⁰ Shaw *International Law* 660.

¹⁸¹ Art. 92 of the UN Charter and Art. 1 of the ICJ Statute.

¹⁸² *Lockerbie* case I.C.J. Reports, 1992, pp.3, 26 and Shaw *International Law* 344.

¹⁸³ Article 35(1) of the ICJ Statute states: “The Court shall be open to the states parties to the present Statute.”

¹⁸⁴ Art. 36(1). Article 34 of the ICJ Statute provides that only states may be parties in a case before the court. Thus private persons and international organisations or corporations may not submit a matter to the ICJ for adjudication.

jurisdiction of the court in certain matters.¹⁸⁵ Finally, the court has jurisdiction with reference to advisory opinions, in which case the court adjudicates by request.¹⁸⁶ Such a request may emanate from the General Assembly, the Security Council or any other organ specially authorised by the General Assembly. Hence with respect to advisory opinions, some international organisations may be party to a matter before the ICJ.

Article 93(1) of the UN Charter provides that all members of the UN are *ipso facto* parties to the ICJ Statute. A state that is not a member of the UN may, however, be party to a case before the ICJ if granted the permission by the General Assembly.¹⁸⁷

The court also has jurisdiction to hear disputes arising out of an international treaty, where a treaty contains a clause to such effect. Most treaties do in fact contain a clause allowing the ICJ jurisdiction over any disputes that may arise.¹⁸⁸

Article 41 of the ICJ Statute allows the court power to issue interim measures and in such a case it need not satisfy itself that it has jurisdiction on the merits of a case.¹⁸⁹ However, in the case of *Guinea-Bissau v Senegal*¹⁹⁰ the court noted that even though it need not finally satisfy itself as to jurisdiction on the merits before indicating provisional measures, it should at least ensure that the provisions invoked do *prima facie* afford the court jurisdiction over the matter.¹⁹¹ The rationale behind this is clear, because it seems pointless for the court to indicate provisional measures in a case where the merits of the claim cannot be entertained for lack of jurisdiction. The primary purpose of the authority to issue interim measures is to protect the rights

¹⁸⁵ Article 36 (2) of the Statute provides for compulsory jurisdiction in disputes concerning: an interpretation of a treaty, a question of international law, the existence of any fact which if established would constitute a breach of international obligation, and finally the nature or extent of the reparation to be made for the breach of an international obligation.

¹⁸⁶ Shaw *International Law* 661.

¹⁸⁷ Art 93(2) of the UN Charter.

¹⁸⁸ See for example the 1965 Convention on Investment Disputes.

¹⁸⁹ See request by Guinea-Bissau for the indication of provisional measures in the *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* ICJ Reports, 1990 pp 64, 68.

¹⁹⁰ *Supra*.

that are the subject of the dispute.¹⁹² It is thus a temporary order put in place to protect the interests of certain parties pending a final decision of the court on the merits. For example, in the trilogy of cases that are the subject of this thesis,¹⁹³ the Applicants in each case requested an interim order directing the US not to carry out the executions pending a decision of the ICJ on the merits in order to protect the lives of the detainees.

3.3 THE ROLE OF THE COURT IN INTERNATIONAL LAW

International adjudication as a means of resolving disputes is appealing for many reasons.¹⁹⁴ For one, the ultimate responsibility of the decision lies with another party. This greatly diminishes the political costs for a state. If one compares the outcome of a negotiation with that of judicial settlement, if a State were to 'lose' in the latter proceedings it bears less responsibility for that loss since internal political forces are more likely to accept a loss if it emanates from an external party.¹⁹⁵ Secondly, the idea of a court appeals to practitioners because it means they can resort to earlier decisions as guidelines for disputes arising later.¹⁹⁶ Although there is no clear system of precedent in international law it is certain that one decision will impact other states in similar situations. Thirdly, the elucidation of principles in cases by judges hearing the matters provides a clear opportunity to develop existing international norms.¹⁹⁷

¹⁹² Shaw *International Law* 671.

¹⁹³ *Vienna Convention on Consular Relations (Paraguay v United States)* (order of 10 November 1998). Accessed at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm> on 6 November 2005. *LaGrand* (judgment of 27 June 2001). Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 6 November 2005. *Avena And other Mexican Nationals (Mexico v United States)* (judgment of 31 March 2004). Accessed at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> on 6 November 2005.

¹⁹⁴ Shaw 1997 *I.C.L.Q* 832.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.* There has been much said on the existence of the common law distinction between *obiter dicta* and *ratio decidendi* in international law decisions. Rosenne (*The Law and Practice of the International Court* 2ed (1985) 87) argues there is no room for *obiter dicta* since art. 95(1) of the Rules of the Court states that the judgment must set out reasons in point of law. However, this issue is the subject of another discussion and will not be dwelt upon in these chapters.

Finally, what distinguishes international adjudication from other resolution methods is that it results in an authoritative decision based on law.¹⁹⁸ This decision may not be a global declaration of the actual content of international law, but it will be binding upon both parties before the court and any departure from such decision will constitute an international violation.

3.3.1 The Court's Record

Despite these positives, the historical record of the ICJ has not always been impressive. Article 36(2) of the ICJ statute provides for compulsory jurisdiction of the court, but less than a third of the parties to the Statute have accepted this clause.¹⁹⁹ Shaw²⁰⁰ suggests that this is clear evidence of the fact that the ICJ merely plays a peripheral role in the international community. It is true that the ICJ register was relatively empty for a season and also true that many members do not accept the court's compulsory jurisdiction.²⁰¹ This has been a prime topic of discussion in academic circles.²⁰² However, Shaw, who was writing in 1991, may today hold a different opinion since from 1991 to date, there has been a dramatic increase in the court's role in international law.

Prior to 1990, the ICJ played a minimal role in the preservation of peace and security. There are various reasons advanced for this. First and foremost, the nature of the legal system itself: in a legal system founded upon 150 member countries that all jealously guard their sovereignty; the ICJ's ability to have jurisdiction over certain matters has been significantly hampered.²⁰³ As it stands, less than one third of the parties to the

¹⁹⁸ Shaw 1997 *I.C.L.Q.* 842.

¹⁹⁹ Shaw *International Law* 679.

²⁰⁰ *Ibid.*

²⁰¹ See Hight "The Peace Palace Heats Up again: The World Court in Business Again?" (1991) 85 *Am. J. Int'l L.* 646, Tiefenbrun "The Role of the World Court in Settling International Disputes: A Recent Assessment" (1997-1998) 20 *Loy. L.A. Int'l & Comp. L.J.* 1.

²⁰² See Kelly "The Changing Process of International Law and the Role of the World Court" (1989-1999) 11 *Mich. J. Int'l L.* 129 at 130 fn 7 & 8.

²⁰³ Shaw *International Law* 679.



ICJ statute have accepted its compulsory jurisdiction.²⁰⁴ In addition to this, a state might not submit to the court's contentious jurisdiction for fear that they might lose a case and erode their independence and autonomy in the international community.²⁰⁵ Secondly, the power of the court to provide effective remedies is fettered by poor enforcement measures²⁰⁶ so that a decision in favour of a winning state might later prove meaningless. Shaw²⁰⁷ provides the *Corfu Channel*²⁰⁸ case as an apt example. The case arose as a result of incidences that occurred on 22 October 1946 in the Corfu strait where two British destroyers struck mines in Albanian waters, causing serious injury and loss to life. When the matter was raised before the Security Council, it was recommended that the matter be brought before the International Court of Justice.²⁰⁹ One of the issues before the court was whether Albania was responsible for the explosion and whether there is a duty to pay compensation in this respect.²¹⁰ The court found in favour of the United Kingdom, holding that Albania was responsible for the explosion.²¹¹ As to the compensation, the court awarded a total of £843,977 for the damages caused to the British ships and the loss as a result of the injuries and deaths.²¹² During the proceedings, Albania announced that the ICJ had no jurisdiction to fix the sum of compensation and its role was merely to deal with the matter in principle. It thus refused to take part in further proceedings, thereby refusing to implement the court's order.

²⁰⁴ See above fn CHECK

²⁰⁵ Shaw *International Law* 679.

²⁰⁶ See 'Enforcement of ICJ decisions' below for a further discussion on this point.

²⁰⁷ *International Law* 679.

²⁰⁸ *Corfu Channel case (United Kingdom v Albania)* 1947-1949, Accessed at <http://www.icj-cij.org/icjwww/icasess/icc/iccframe.htm> on 16 June 2006).

²⁰⁹ See *Corfu Channel* (judgment of 25 March 1948) *supra* at 17. Accessed at http://www.icj-cij.org/icjwww/icasess/icc/icc_ijudgment/icc_ijudgment_19480325.pdf on 16 June 2006).

²¹⁰ See *Corfu Channel* (judgment of 9 April 1949) *supra* at 6. Accessed at http://www.icj-cij.org/icjwww/icasess/icc/icc_ijudgment/icc_ijudgment_19490409.pdf on 16 June 2006).

²¹¹ *Supra* at 23.

²¹² *Supra*.

Thirdly, adjudication as a system of dispute resolution is highly inflexible as compared to other settlement procedures, in that a decision once given is final and binding on the parties before the court, unlike negotiation, which allows a state time to concede to particular measures. Finally, the court has often been viewed as a hegemonic force, particularly by Third World countries.²¹³ This perception that the court is 'traditionalist developed-world dominated'²¹⁴ was exacerbated by the lack of African or Asian representation on the court.²¹⁵ Furthermore, the *South West Africa* cases²¹⁶ were a sore disappointment for many developing states, in that they appeared to show the ICJ's inability to grasp the true essence of a dispute. The first phase of the case turned on the status of South West Africa; whether it was a territory still under the Mandate system. The Court answered this question in the affirmative.²¹⁷ In the second phase of the case, Ethiopia and Liberia brought a case before the ICJ in 1966, in their capacity as members of the former League of Nations.²¹⁸ The basis of the

²¹³ Shaw *International Law* 679.

²¹⁴ *Ibid.*

²¹⁵ Shaw *International Law* 679. Today the court is represented by three African judges; Nabil Elaraby (Egypt), Abdul G Koroma (Sierra Leone) and Raymond Ranjeva (Madagascar) and three Asian judges; Shi Jiuyong (China), Vladlen S Vereshchetin (Russian Federation), Hisashi Owada (Japan). See <http://www.icj-cij.org/icjwww/igeneralinformation/igncompos.html> (accessed on 7 June 2006).

²¹⁶ *South West Africa: Ethiopia v South Africa; Liberia v South Africa* (Second phase, Judgment of 18 July 1966). Accessed at <http://www.icj-cij.org/icjwww/idecisions/isummaries/ilsaesasummary660718.htm> on 10 June 2006).

²¹⁷ The facts were as follows: it concerned territory then called South West Africa, which had been renounced by Germany in the Treaty of Versailles (*International Status of South West Africa* Advisory Opinion of 11 July 1950. Accessed at <http://www.icj-cij.org/icjwww/idecisions/isummaries/isswasummary500711.htm> on 10 June 2006). The territory was then placed under a Mandate conferred on the Union of South Africa. After World War II, the Union of South Africa alleged that the Mandate had lapsed and sought the recognition of the United Nations to incorporate the territory. The matter was submitted to the ICJ in 1946 for an advisory opinion after the Union of South Africa had failed to place the territory under Trusteeship as required by chapter 12 of the United Nations Charter (*Supra*). The issue in question was thus the status of the territory. The court first considered the nature of the Mandate and if it was still in existence. It had been contended on behalf of the Union that the Mandate had lapsed because the League of Nations, the 'Mandator', had ceased to exist. The court however found that the role of the League of Nations as a 'Mandator' was simply a supervisory role and that the purpose of the mandate was to protect the inhabitants of the territory (*Supra*). This being the object, the mandate still existed because its *raison d'être* was independent of the existence of the League. The court thus held that South West Africa was still a territory under the Mandate system, and therefore the Union Government was still obliged to report on the progress and status of its inhabitants (*Supra*). If the status were to be altered, the Union government could not do this unilaterally but must first submit the territory under the trustee system as required by Chapter XII of the United Nations Charter.

²¹⁸ *South West Africa* (second phase: judgment of 18 July 1966) *supra*.

claim was a breach of certain duties entrusted to South Africa in the Mandate. The Court in its judgment returned to the essence of the Mandate as enumerated in the 1950 decision and held that since the mandate was a 'sacred trust of civilisation', it indeed did concern all civilised nations.²¹⁹ But in order for this interest to have a juridical basis it had to have more than just a moral or humanitarian content.²²⁰ Thus the court was viewed as a product of European imperialism that did not take into account the changing patterns of international relations.²²¹ It thus appeared that the Court was wedded to western ideas and approaches to international law.²²²

In recent times the court has reformed its reputation. The court is busier than ever and has grown to be increasingly respected. Susan W. Teifenbrun²²³ shows the case statistics: from 1946-1987 the ICJ conferred judgment on the merits of 23 cases, terminated 12 cases in the preliminary stages, discontinued five cases and issued 19 advisory opinions. In the nineties, this reputation changed dramatically, largely because of a change in the global political climate. The 1991 reports show that in the two preceding years, nine new cases were submitted to the court.²²⁴ As from October 1993, the World Court had a full docket and was operating at a productive pace. The figures reflected below demonstrate this.²²⁵

1. 1992-1993: Eleven cases (at various stages of resolution).²²⁶
2. 1993-1994: Thirteen cases (12 contentious cases and one advisory opinion).²²⁷

²¹⁹ *Supra*.

²²⁰ See *South West Africa (second phase: judgment of 18 July 1966)* at para 17. Accessed at <http://www.icj-cij.org/icjwww/i/decisions/isummaries/ilsaesasummary660718.htm> on 10 June 2006).

²²¹ See further Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J.* 2.

²²² Harris *Cases and Materials on International Law* 5th ed (1998) 989.

²²³ Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J.*, quoting Nagendra Singh *The role and Record of the International Court of Justice* (1989) 43.

²²⁴ Hight 1991 *Am. J. Int'l L.* 647.

²²⁵ See Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J.* 17.

²²⁶ Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J.* 14.

²²⁷ According to the Report of the Secretary General on the work of the organisation, September 1994. Also see Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J.* at 15.

3. 1995-1996: Fourteen cases (12 contentious cases and two advisory opinions).²²⁸
4. Aug 1999- July 2000: Two new contentious cases taken on, bringing the total number of contentious cases pending to 25.²²⁹
5. Aug 2000- July 2001: Three new contentious cases, total of 26 contentious cases pending.²³⁰
6. Aug 2001- July 2002: Three new cases, total of 25 contentious cases pending.²³¹
7. Aug 2002 - July 2003: Four new cases, total of 28 contentious cases pending.²³²

Thus the court got off to a bad start, with its poor performance peaking in the 1980s. The 1990s however brought much positive change for the court and it is hoped that this positive change will continue through the years to come. With the advent of non-governmental organisations and increased corporate activity in the international plain, there is bound to be more work for the court as the players in the international field increase.

3.3.2 The court as a means of dispute resolution

Despite the abovementioned positives, the role of the ICJ in the international community is not as central as one might like to think. The ICJ does not hold the same position that a domestic court has, in that it does not stand as an authoritative body in international law in the same way that a domestic court stands as an authoritative arm of a national government. The reason for this is the make up of the international legal system, the consensual nature of the court's jurisdiction and the fact that there is no

²²⁸ Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J* at 19.

²²⁹ Report of the International Court of Justice, Ch V, para 78. Accessed at http://www.icj-cij.org/icjwww/igeneralinformation/igeninf_Annual_Reports/iICJ_Annual_Report_1999-2000.htm on 27/08/05.

²³⁰ Report of the International Court of Justice Ch V para 78. Accessed at http://www.icj-cij.org/icjwww/igeneralinformation/igeninf_Annual_Reports/iICJ_Annual_Report_2000-2001.PDF on 27 August 2005.

²³¹ Report of the International Court of Justice, Ch V, para 89. Accessed at http://www.icj-cij.org/icjwww/igeneralinformation/igeninf_Annual_Reports/iICJ_Annual_Report_2001-2002.PDF on 27 August 2005.

²³² Report of the International Court of Justice, Ch V, para 97. Accessed at http://www.icj-cij.org/icjwww/igeneralinformation/igeninf_Annual_Reports/iicj_annual_report_2002-2003.pdf on 27 August 2005.

system of *stare decisis* in international law alongside other political motivations. So as a starting point, the role of the ICJ should be seen against the backdrop of other dispute resolution mechanisms in international law. The pluralistic context helps to highlight the complicated environment in which the court operates.

There are various methods of peaceful resolution, ranging from negotiation, mediation, and conciliation, to arbitration.²³³ Because of the variety of methods available to a state seeking to settle a dispute, judicial settlement may be resorted to as part of a broader strategy of dispute resolution. The *Nauru*²³⁴ case is an excellent example of this. In *casu*, a dispute arose with respect to the rehabilitation of certain phosphate lands. It was alleged that Australia, having the role of mandatory over the Nauru territory, had been exploiting certain phosphate deposits in Nauru.²³⁵ Nauru had attempted several negotiations, but Australia was not forthcoming. The dispute went through various stages and the gradual process to resolution involved many players, the United Nations Trusteeship Council, the Nauru Local Government Council and the ICJ.²³⁶ But it was the ICJ that played a crucial role in bringing the matter to a close. In response to the claims raised by Nauru, Australia argued before the ICJ that Nauru had waived their rights in respect the rehabilitation of certain lands.²³⁷ These arguments, among others, were all rejected by the court. When dealing with the last point, the court's judgment set out reasons that show that Nauru had not waived its rights. These matters were all raised at the procedural stage of the case. Thus it was clear that at the merits stage, the court would have found in favour of Nauru.²³⁸ Adjudication was thus useful in the circumstances because it served to balance the playing ground between Nauru (a small nation) and Australia (a major

²³³ Shaw 1997 *I.C.L.Q.* at 836.

²³⁴ *Supra*.

²³⁵ See Memorial of the Republic of Nauru in Certain *phosphate lands in Nauru (Nauru v Australia)*. Accessed at http://www.icj-cij.org/icjwww/icas/inaus/iNAUSpleadings/inaus_ipleadings_199004_MemorialNauru_Part1Chapter1.pdf on 27 August 2005.

²³⁶ McLennan "International Dispute Resolution" (2002) 6 *JSPL Articles* (accessed at http://www.vanuatu.usp.ac.fj/journal_splaw/Articles/McLennan1.htm on 27 August 2005).

²³⁷ See *Nauru case supra* note 2 (Judgment of 26 June 1992) at para 14 accessed at <http://www.icj-cij.org/icjwww/icas/inaus/inausframe.htm> on 27 August 2005.

²³⁸ McLennan 2002 6 *JSPL Articles*.

power). The ICJ thus played a crucial role in providing preliminary adjudication proceedings that would later enable Nauru to enhance its bargaining power against the other states sufficiently to allow for equitable negotiations to take place. Such negotiations did follow because on 13 September 1993, the court made an order to place the matter on discontinuance by agreement of the parties. The case is of relevance because in the end it was not the ICJ that resolved the dispute but negotiations were eventually entered into after the case was withdrawn from the court. The court had acted as a catalyst to resolution in the case, primarily because it offered a means through which the playing fields could be levelled. Australia and Nauru could come before the court as independent and sovereign states, thereby disarming Australia of all its power.

The case thus demonstrates how adjudication can be used in international practice as part of a greater strategy to resolve a dispute. Dispute resolution should not be compartmentalised. Consequently, the ICJ should not be perceived as the only means to resolve an international dispute, since it can play a role alongside other avenues in bring a matter to finality.

3.3.3 Expanding the court's role

The function of the international court as laid out in art. 38 of the ICJ Statute is to “decide in accordance with international law such disputes as are submitted to it”. This article can be narrowly read to say that the court should merely settle the disputes before it by applying the relevant principles of international law. But a preferred interpretation is taken from a broad reading of this article. Therefore the better view suggests that the international court is not merely called upon to settle the dispute, but in doing so it must develop the law. The latter seems the better view, since international law evolves and the drafters of the various documents could not have conceived of every possible problem that would arise.

Some academics have criticised the court's ability to make authoritative decisions based on law.²³⁹ The argument goes that the constitutional function and role of the

²³⁹ Sellers “The Authority of the International Court of Justice” (2002) 8 *Int'l Legal Theory* 41.

court is not to make authoritative decisions of law, but merely to settle disputes. Sellers²⁴⁰ suggests that the tendency to view the judgments of the ICJ as decisive evidence of the content of international law arises by analogy with the role of domestic courts. He states that not only was the ICJ never intended to determine the law but it is ill-equipped to determine the content of international law.²⁴¹ Despite this argument, it is clear that the impact of any decision of the ICJ has far-reaching effects. These effects may not just be legal, but may be political. For example, in the *Fisheries* case, the *Corfu* case and *Iran* case²⁴² we see clear examples of non-compliance with an ICJ order; but despite the digression, the decision still had lasting impact that went beyond mere compliance.

The above shows that the ICJ should have a responsibility that goes beyond the narrow interpretation of its functions and its role to settle the dispute before it.

It has been said that the ICJ is at the apex of international legal development.²⁴³ This opinion suggests that the ICJ should not just settle the dispute before it but it should develop international law whilst doing so. The separate opinion of Judge Lachs in the *Aegean Sea Continental Shelf* Case²⁴⁴ is illustrative of this opinion. The case concerned a dispute with respect to the Aegean Sea continental shelf. Greece requested the court to declare the course of the boundary between the portions of the continental shelf. In *casu*, Greece sought to establish the court's jurisdiction on two

²⁴⁰ *Ibid.*

²⁴¹ See Sellers 2002 *Int'l legal Theory* 46, where he argues that the ICJ as an institution of dispute resolution is not well equipped to determine the content of international law because it is subject to the political control and oversight of interested states. He uses an example the election process of judges in the court and shows that such judges are elected with the significant participation of governments that hold seats in the UN General Assembly, which leaves them subject to the influence of these governments. The result is that the court lacks the independence that is necessary for a court to hold decisive authority.

²⁴² *Fisheries Jurisdiction (United Kingdom v Iceland)* (1972-1974). Accessed at <http://www.icj-cij.org/icjwww/icas/ia/iaiframe.htm> on 27 August 2005, *Corfu Channel case supra*, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* (1951-1952). Accessed at <http://www.icj-cij.org/icjwww/id/decisions.htm> on 25 August 2005.

²⁴³ Shaw *International Law* 850.

²⁴⁴ (*Greece v Turkey*) accessed at <http://www.icj-cij.org/icjwww/icas/igt/igtframe.htm> on 27 August 2005.

bases, one of which was a communiqué made to the press by the Greek and Turkish Prime Ministers following a meeting between them.²⁴⁵ The communiqué stated that any problems between the two countries would be settled by means of negotiation and with respect to the continental shelf territory; the problem would be submitted to the ICJ.²⁴⁶ The court held that the communiqué was not a valid basis to establish jurisdiction because it did not indicate an unconditional intention to subject the matter to the court for adjudication.²⁴⁷ What was envisaged however, was a joint submission of the case by the two countries rather than a unilateral application as had occurred. The court thus found that there were no grounds for jurisdiction.

In a separate opinion²⁴⁸, Judge Lachs dealt with the matter more extensively by describing the nature of the communiqué and expressing his opinion on the relationship between negotiations and the functions of the ICJ. He thus adds that negotiations and adjudication need not be seen as opposing forces but they should be seen as complementary means of resolving disputes, which may be used concurrently or successively, depending on which method would facilitate the resolution of the dispute efficiently and effectively.²⁴⁹ This case thus presents a situation where the court discharges its obligation to resolve disputes just as it should. One judge, however, then goes further than the dispute that appears before him and reflects on the problem in a manner that will be helpful to others seeking clarity on the legal issues drawn from the case. Judge Lachs's opinion thus sheds light not only on the matter before the court, but on the interplay of different dispute resolution mechanisms in international law, more specifically negotiations and adjudication. This case is thus a good illustration of the need to have the ICJ develop the law and not confine its role to merely settling the dispute in a narrow sense.

²⁴⁵ *Aegean Continental Shelf case* (See judgment of 19 December 1978) *supra* at para 12.

²⁴⁶ *Aegean Continental Shelf Case supra* at para 94.

²⁴⁷ *Aegean Continental Shelf Case supra* at para 106.

²⁴⁸ *Aegean Continental Shelf Case* accessed at <http://www.icj-cij.org/icjwww/icasess/igt/igtframe.htm> on 27 August 2006.

²⁴⁹ *Aegean Continental Shelf Case at 50 supra*.

Thus Shaw²⁵⁰ argues that substantive law is very definitive on the role of the court, in that its enabling statute clearly lays out its function, powers and limitations. However, he goes on to further say that societal needs and expectations argue for a broader rather than a narrower approach for the court in its role of settling disputes. The role of the court should not just be confined to settling disputes, but it should be seen in broader context of other dispute resolution methods and the more general need to advance international jurisprudence by developing the current law through the court's decisions.

3.4 ENFORCEMENT PROCEDURES

3.4.1 The Role of the Security Council

The ICJ Statute does not provide for enforcement mechanisms, but art. 94 of the UN Charter covers this to a point. It reads:

- “1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party **may** (*own emphasis added*) have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”

Thus the Security Council is tasked with the responsibility of enforcing the ICJ judgments. It is noteworthy that art. 94(2) is framed in very broad language, with the use of the permissive ‘may’ instead of more mandatory language. This gives the Security Council wide discretion with respect to enforcement. This wide discretion granted to the Security Council leaves the court to rely on the “logic of political negotiation between Members of the Council with regard to the enforcement of its

²⁵⁰ Shaw *International Law* 51.

judgments...²⁵¹ According to Tanzi, the section is so broadly framed that it in effect gives the Security Council the right not to enforce a decision of the court, even where a successful member requests it to do so.²⁵² However, Tanzi adds that this seemingly unusual situation is not atypical of the overall political underpinnings of the UN Structure.²⁵³ The Security Council is both the sole institution for the enforcement of ICJ decisions and the UN's premier political organ. To place an absolute obligation on the Security Council to enforce a decision of the ICJ would amount to subjecting the Security Council to the authority of the ICJ.²⁵⁴ For example, if the political evaluations of a particular case differ from the legal evaluations of the Court, it would be unrealistic to assume that the Security Council would give way to the legal reasoning of the Court at the cost of political relations. Tanzi²⁵⁵ also highlights, and quite correctly so, the fact that the UN Charter is a construction centred on the five Permanent Members of the Council and it is unlikely that the Security Council will pass a resolution against one of these Permanent Members, where they lose a case before the ICJ. In essence, Professor Tanzi finds that Article 94(2) is founded on political reasons. This argument seems plausible, since there would seem to be no logical legal reasoning for a clause that gives such a wide discretion, especially when poor enforcement mechanisms can threaten the institutional integrity of any court.

The *Case of the Military and Paramilitary Activities in and against Nicaragua*²⁵⁶ is an example of a case where the inaction of the Council posed a threat to the authority of the ICJ. After receiving judgment in its favour²⁵⁷, the Permanent Representative of Nicaragua to the UN requested a meeting of the Security Council to consider the non-

²⁵¹ Tanzi "Problems of the Enforcement of Decisions of the International Court of Justice and the Law of the United Nations" (1995) *EJIL* 1at 3.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ Tanzi 1995 *EJIL* 4.

²⁵⁵ *Ibid.*

²⁵⁶ Judgment of 27 June 1986 (accessed at <http://www.icj-cij.org/icjwww/icasess/inus/inusframe.htm> on 26 January 2006).

²⁵⁷ Judgment of 27 June 1986 *supra*.

compliance with a decision that had been passed by the ICJ four months earlier.²⁵⁸ The meeting was held and produced a draft resolution calling for the immediate compliance with the order.²⁵⁹ However, the draft resolution was not adopted by the President of the Council due to the negative vote of one of the members, the United States. The latter disputed the validity of the judgment on the basis that the ICJ had neither jurisdiction nor competence in the matter.²⁶⁰ The objection by the United States was thus on legal and not political grounds. This had the effect of placing in question the authority of the ICJ and ultimately its reputation. The authority of the court was however left intact due to the fact the other members of the Council who abstained from the vote, did so on political grounds.²⁶¹ The case thus illustrates how the response of the Security Council can have a negative impact on the authority of the ICJ.

Tanzi concludes that the balance must be struck by separating the decision before the court and the issue of non-compliance with an ICJ decision. His argument goes that the UN Charter charges a political body (the Security Council) with the enforcement of ICJ decisions because at that point, the issue is no longer of a legal nature, but of a political nature. Prior to such point, that is, when the matter is still before the ICJ, issues of a legal nature necessarily prevail, making the ICJ the best body suited to deal with the matter.²⁶²

²⁵⁸ Letter dated 17 October 1986. See UN Doc. S/ 18415 (Accessed at <http://www.un.org/documents/> on 26 January 2006).

²⁵⁹ UN Doc. S/18428 (Accessed at <http://www.un.org/documents/>) on 26 January 2006).

²⁶⁰ UN DOC. S/PV. 2718 at 44 (accessed at <http://www.un.org/documents/>) on 26 January 2006.

²⁶¹ For example Thailand, France and the United Kingdom who objected to the draft resolution on the grounds of political implications. (SEE Tanzi 1995 *EJIL* 7).

²⁶² Tanzi 1995 *EJIL* 36.

3.4.2 Enforcement by other bodies

Measures aimed at enforcing an ICJ decision may be taken by a body other than the Security Council.²⁶³ This finding is based on an extensive interpretation of Article 48 of the UN Charter. This section reads as follows:

“1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”

In theory, if one could show that action by the Security Council to enforce an ICJ decision is necessary for the maintenance of peace, the Security Council could defer authority to deal with a defaulting party in terms of this section. This would not be incompatible with some treaties, for example the Constituent Treaty of the International Labour Organization, which provides that where there has been non-compliance with an ICJ decision, the “Governing body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith”.²⁶⁴

Thus methods of enforcement vary, deference to an international organisation being one option. A successful party may resort to diplomatic measures, negotiation and mediation, and even resort to economic pressure.

An issue of great interest is whether a state may refer to municipal courts to seek compliance with an ICJ order or judgment. The matter was raised in the Belgian case

²⁶³ Tanzi 1995 *EJIL* 26.

²⁶⁴ Article 33 of the Treaty of the International Labour Organisation.

of *Scobelge v Greece*²⁶⁵ in which a Belgian firm sought to attach the funds of the Greek Government in Belgium pursuant to a decision of the Permanent Court. The court denied the action on the basis of a technicality, but the case suggests nonetheless that an international judicial arbitral award may be the subject of a case before a municipal court. This issue will be explored further in later chapters.

Resort to armed force to secure legal rights would not be in keeping with Article 2, paragraphs 3 and 4 of the UN Charter.²⁶⁶ This is thus not a valid means of enforcing a decision since it cuts at the heart of the purpose of the UN Charter: the maintenance of peace and security.²⁶⁷

The provisions in art. 94(2) are thus in no way satisfactory, since they leave a state at the whim of the Security Council, which is itself a body with a political agenda. The intricate relationship between international law and politics cannot be done away with, but with the increase of players in the international field and rapid growth of human rights recognition, the question of enforcement will become even more important. Hence the issue of municipal courts enforcing international judgments is re-emerging. In the meantime, the court remains without sheriffs or constables to enforce its decrees in the same way that domestic courts do, and as such it largely relies on the goodwill of states.

²⁶⁵ *Societe Commerciale de Belgique c Etat Hellenic de Grece*, Brussels Civil Tribunal (1951).

²⁶⁶ Article 2(3) and 2(4) of the UN Charter provide that:
“3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

²⁶⁷ Article 1 of the United Nations Charter.

3.5 EVALUATING THE COURT

3.5.1 The court's contribution to international law

The PCIJ started off well, developing international law professionally and successfully resolving some serious disputes, thereby showing that the idea of a strong judicial body amidst the political goings-on of the world could work. A look at the court's jurisprudence will reveal that in the past the majority of its work emanated from Europe. This diminished the Court's global nature. The ICJ, however, has improved greatly in this respect. For one, it now operates as a truly global court. Disputes before the court range from South America²⁶⁸ through Africa²⁶⁹ and Gulf States²⁷⁰ right through to the Pacific regions.²⁷¹ Another great achievement of the court is its contribution to the resolution of international tensions²⁷² and in the realm of international law development.²⁷³ Judge Weeramantry refers to two areas in particular, where the ICJ has been instrumental in the advancement of those disciplines in international jurisprudence: the law of the sea and the interpretation of treaties.²⁷⁴ The Law of the Sea Convention, which now stands as a codification of the rules applicable to the Law of Sea, arose from ICJ jurisprudence. For example, the *Fisheries*²⁷⁵ set the baseline on how to determine territorial sea. With respect to the

²⁶⁸ For example: *Haya de la Torre (Colombia v. Peru)* (1950-1951), *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (1986-1992), *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (2001-). Accessed on the ICJ Website at <http://www.icj-cij.org/icjwww/idecisions.htm> on 28 January 2006.

²⁶⁹ For example: *Frontier Dispute (Benin/Niger)* (2002), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)* (1999-2001), *Frontier Dispute (Burkina Faso/Republic of Mali)* (1983-1986). Accessed on the ICJ Website at <http://www.icj-cij.org/icjwww/idecisions.htm> on 28 January 2006.

²⁷⁰ For example: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (1991-2001). Accessed on ICJ website at <http://www.icj-cij.org/icjwww/idecisions.htm> on 28 January 2006.

²⁷¹ *Nauru Case supra*.

²⁷² Weeramantry 1994 *Monash Univ LR* at 190.

²⁷³ *Ibid*.

²⁷⁴ *Ibid*.

²⁷⁵ *Fisheries (United Kingdom v Norway)* 1949-1950. Accessed at <http://www.icj-cij.org/icjwww/icasess/iukn/iuknframe.htm>. on 28 January 2006.

interpretation of treaties, the rules on interpretation gathered from the Vienna Convention on the Interpretation of Treaties come from decisions of the court. Thus the court's record of achievement has been good, despite its lack of enforcement procedures.

One of the strengths of the court lies in its representative character. Article 2 of the ICJ Statute refers to "a body of independent judges". The perceived impartiality of the court is indispensable to the functioning of the court. The current composition of the court reflects this.²⁷⁶

Another strength of the court lies in the ideal of the court itself. The world 'court' was established to address a universal need for the peaceful settlement of international disputes. Its very existence provides a state with the opportunity to resolve an international dispute legally.²⁷⁷

3.5.2 Challenges for the Court

However, the court is plagued by many weaknesses, some attributed to the structure and the functioning of the court and others simply to the international legal order. Firstly, the delays in the court's proceedings is a major deterrent for a prospective litigant. These delays are attributed to the large number of dissenting and separate opinions provided in each judgment.²⁷⁸ Some nations object to the procedure by which the judges are elected on the basis that they do not have uniform qualifications, impartiality and independence. Furthermore, the unpredictability of the court's decisions has weakened its attractiveness. The fact that the court applies an uncodified customary international law system means that a prospective litigant cannot know with certainty which way the court will decide and which law will be applied. Thus, the substantive law to be applied by the court is indeterminate. Even where the rules of customary law are known there is still the trouble of its acceptance.

²⁷⁶ See note 215 above.

²⁷⁷ Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J* at 24.

²⁷⁸ Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J* at 20.

According to Falk²⁷⁹ the narrow positivistic jurisprudential style of the court significantly impairs its functioning. He argues that the style of the court is largely Western, making it less responsive to non-Western nations. He thus suggests a more pluralistic jurisprudence that takes into account the diversity and multicultural ideology reflected by the UN Charter.²⁸⁰ In response to this, Kelly²⁸¹ argues that a more pluralistic standpoint will cause a fragmentation of the jurisprudence. The crux of his argument is that a tilt towards one paradigm is a shift away from another, because the problem lies in the disagreements of these so-called pluralistic norms.²⁸² Principles such as sovereignty, self-determination and even human rights have different meanings in different contexts and in applying a particular norm, the effect may be to raise a bias towards one state and so encourage the withdrawal of other states. Kelly²⁸³ identifies the root cause for the court's weakness in the fundamental disagreement of the content of norms in international law. He argues that the court is weakened by faulty perspectives of its role. The disagreements about the content and formation of international norms call into question the very legitimacy of the international legal order itself,²⁸⁴ thus weakening the court, as the applier of these norms. He says the only way to solve the problem is for sovereign nations to redefine customary international legal principles through multilateral treaty negotiations.²⁸⁵

Whatever the root cause of the court's weaknesses, it would be too simplistic to attempt to identify one cause and produce a solution. So both Falk and Kelly's arguments hold some water. What is interesting about Kelly's argument that the problem lies in the fluidity of the international norms is that it suggests that the problem lies not with the court itself but with the system of international law.

²⁷⁹ Richard Falk *Reviving the World Court* (1986) 178-180.

²⁸⁰ *Ibid.*

²⁸¹ Kelly "The Changing Process of International Law and the Role of the World Court" (1989-1990) 11 *Mich. J. Int'l L.* 129.

²⁸² Kelly 1989-1990 *Mich. J. Int'l L.* at 159.

²⁸³ Kelly 1989-1990 *Mich. J. Int'l L.* at 160.

²⁸⁴ Kelly 1989-1990 *Mich. J. Int'l L.* at 159.

²⁸⁵ Kelly 1989-1990 *Mich. J. Int'l L.* at 166.

Finally, one of the major weaknesses of the court is the poor compliance with its decisions. For example, the *Corfu Channel* case, the *Fisheries Jurisdiction* case, the *U.S. Diplomatic and Consular Staff in Tehran* case, and the *Nicaragua* case were not respected.²⁸⁶

3.6 CHAPTER CONCLUSION

The chapter has set out the limits of the ICJ's power and authority. This will be a foundation to understand many of the criticisms raised against the court's action in the *LaGrand*²⁸⁷ case. It has also been shown that the ICJ as an institution for dispute resolution possesses great potential, in terms of it being a truly global court presided by independent judges who are selected by means of a stringent process. It was noted that the ICJ's function in international law has increased greatly in the 1990s, while attention was drawn to the fact that there remains much room for expansion in developing international legal norms.

A prominent author once said whilst writing on the possibilities of world government through a world court :

“There is little reason to expect that the nations of the world could establish a world court with compulsory jurisdiction. How could it keep peace? The long-standing and operative causes of war do not constitute justiciable controversies. Nations go to war over problems that no court can settle.”²⁸⁸

This opinion explains why the court has not lived up to many standards set for it. The court is often judged on the same basis that a national court is judged and when the

²⁸⁶ *Supra*. On *U.S. Diplomatic and Consular Staff in Tehran*. Accessed at <http://www.icj-cij.org/icjwww/icas/iusir/iusirframe.htm> on 27 January 2006.

²⁸⁷ *Germany v United States*. Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 27 January 2006.

²⁸⁸ Briggs “The Cloudy Prospects for ‘Peace Through Law’ ” (1980) 46 A.B.A.J. 490 quoted in John Dixon ‘The Connally Amendment - The Conflict Between Nationalism and an effective World Court’ (1964-1965) 53 *Kentucky L. J.* 164 at 166.

two are measured against each other, the former is often found wanting. However, the ICJ does not exercise the same kind of authority as a domestic court. It does not command the same kind of respect and it does not hold the same kind of power. All these supposed weaknesses are attributed to the nature of international law and not to the workings of the court *per se*. Despite this, the decisions and opinions expressed by the ICJ over time have played a vital role in the evolution of international law; the *Nauru* case being a prime example. According to McLennan,²⁸⁹ the *Nauru* case is an example where adjudication as a means of resolving a dispute worked for the best. On the one hand, it raised international confidence in the competence of the ICJ whilst also quelling any suspicions that the court was an institution bent towards colonialism. So the *Nauru* decision stands as a victory for the ICJ, in that it demonstrates to the world that developing states could participate as sovereign states before the court, and encourages other post-colonial states to bring cases before the court.²⁹⁰

In the chapters to come, the future of the ICJ will be examined. This chapter has shown that any discussion on the Court's success and development must be cognisant of the organisation of international law. It has also been shown that the costs of adjudication can be very high and unpredictable, very often deterring potential litigators. The risk of entrusting national interest in the hands of a few foreign judges who may be biased is overwhelming for many states, causing gravitation to other resolution methods.²⁹¹ This does not, however, detract from the functionality of the Court. The chapter has shown that despite the complexities of the international context, the Court has attained a full roll and is now busier than ever. The focus of the remaining chapters will be to examine the role of the court vis-à-vis domestic law, with the aim of attaining peaceful resolution through reciprocation with national courts.

To conclude, in the words of Weeramantry:²⁹²

²⁸⁹ 2002 *JSPL Articles*.

²⁹⁰ *Ibid*.

²⁹¹ Tiefenbrun 1997-1998 *Loy. L.A. Int'l & Comp. L.J* 25.

²⁹² Weeramantry 1994 *Monash Univ LR* 191.

“the International Court of Justice... is the most valuable instrument yet available to the international community for developing international law adequately to meet the needs of a changing world, for providing a focal point for the peaceful resolution of international disputes, for radiating through the entire global community a consciousness of the international rule of law and for injecting an authoritative legal element into the processes of preventative diplomacy.”

CHAPTER 4

LAGRAND AND SIMILAR DECISIONS

Contents

- 1 *Overview*
 - 2 *LaGrand (Germany v United States)*
 - 3 *Implications of LaGrand*
 - 4 *Before and after LaGrand*
 - 5 *Lessons From The Trilogy Of Cases*
 - 6 *Conclusion*
-

4.1 OVERVIEW

In a highly contentious case, the ICJ held that the United States had breached its international obligation to Germany under Article 36(1) of the Vienna Convention on Consular Relations (VCCR)²⁹³. The case came to the Court after two German Nationals had been convicted of murder and sentenced to death, but not informed of their rights to Consular assistance. Once the German Consulate discovered the matter, it engaged in various efforts to appeal the case on behalf of the nationals. The U.S. authorities did not permit review of the case on the basis of a domestic law rule that prevented the claim being raised further. After the execution of one of the nationals, the German government made an *ex parte* application to the ICJ, seeking a provisional measures order from the ICJ in an attempt to stay the execution of the other national, still in detention. The court issued the order, which was subsequently disregarded by the United States. At the final hearing of the case, the court ruled that the United States had breached its international obligations to Germany, and declared that provisional measures issued by the court had binding effect.

²⁹³ Vienna Convention on Consular Rights. April 24 1963.

*LaGrand (Germany v United States)*²⁹⁴ has been chosen as a case study because the issues dealt with in the case enumerate many points of concern in international law and is thus an ideal springboard onto the current topic. The case has been chosen for the following reasons:

1. It presents a rare instance where the treaty obligations of a State, affecting individual rights, were the subject of international adjudication. As such, issues of the relationship between international law and domestic law immediately become relevant.
2. The case also presents another rare instance where the issues concerning the criminal justice system of a state are placed before the ICJ, a matter that is not traditionally the subject of international law.
3. The *LaGrand* decision signifies a momentous shift in the court's injunctive authority that is likely to impact the future work of international courts and tribunals.
4. The case shows the tension between international law and national law. This is primarily evident with respect to the impact of a decision of an international court on domestic law. A less evident display of the tension between international law and national law can be seen through a clash of worldviews on the death penalty issue.

The purpose of this chapter is to outline the essential facts and issues arising in *LaGrand*. The section takes an in-depth analysis at the case and the comments of various academics on the issues raised *in casu*, more specifically the following questions:

- 1 What is the effect of a declaration that provisional measures of the ICJ are binding as a matter of international law?
- 2 Was the case essentially about the international community's abhorrence for the death penalty?

²⁹⁴ [1999] ICJ Reports 9 (3 March). (Hereinafter referred to as *LaGrand*). Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 27 January 2006.

- 3 Did the ICJ exercise undue power in *LaGrand* by interfering in the domestic proceedings of a sovereign state?
- 4 What are the implications of the court's ruling that the VCCR gives rise to individual rights?

It is not the aim of this chapter to consider the correctness of the ICJ's findings in *LaGrand*. This would involve a lengthy discussion of other international principles that do not fall within the scope of this thesis. Rather, this chapter will focus on the consequences of the findings in *LaGrand*, as this facilitates a discussion on the relationship between international law and domestic law. This chapter will thus begin with a broad outline of the background and facts of the case and the implications of the Court's decision. The next section will then analyse similar cases that have appeared before the Court to demonstrate the gravity of the problem and show how the court has advanced its argument since the first time it was faced with the problem. The final section draws out lessons to be learnt from *LaGrand* and the other Consular rights cases that have appeared before the Court.

4.2 LAGRAND (*GERMANY V UNITED STATES*)²⁹⁵

4.2.1 Background and Facts

The facts of the case are as follows: In 1984, Walter LaGrand and Karl LaGrand were convicted and sentenced to death by the Superior Court in Arizona.²⁹⁶ Both were German nationals, but had gained permanent American residency since the family had moved to the U.S. in 1974. In terms of the VCCR, the brothers should have been informed of their consular rights but throughout their period of arrest and conviction, they were never informed of their right to communicate with the German

²⁹⁵ *Supra* note 307.

²⁹⁶ *LaGrand* (judgment of 27 June 2001) (hereinafter referred to as the *LaGrand* judgment) *supra* at para 14, which shows that the brothers had been convicted of murder in the first degree, two counts of kidnapping, attempted arm robbery and attempted murder in the first degree.

Consulate.²⁹⁷ At no point in the proceedings was the German Consulate informed of the arrests and convictions.²⁹⁸

The brothers tried to challenge the decision in three subsequent legal proceedings but all three applications were denied.²⁹⁹ It was only at the stage of the third proceedings in December 1992 that the German Consulate was informed of the arrests.³⁰⁰ The German Consulate then filed a writ of *habeas corpus*³⁰¹ in the United States District Court for the State of Arizona, seeking to have their convictions and sentences set aside.³⁰² Multiple claims were raised, one of which was that United States authorities

²⁹⁷ Article 36(1) of the Vienna Convention on Consular Relations (VCCR) reads to the effect that:

- I. Consular officers shall be free to communicate with nationals of a sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
- II. If a National so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay.

The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

- III. Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

(The terms 'sending State' and 'receiving State' are used throughout the treaty. 'Sending State' refers to the state of origin of the foreign consulate. 'Receiving State' refers to the host state where the foreign consulate is located.)

²⁹⁸ *LaGrand* judgment *supra* at para 15. Furthermore, the *LaGrand* brothers had learnt of their rights from two German inmates and not through the Arizona authorities. (See *LaGrand* (Memorial of the Federal Republic of Germany) *supra* at para 2.06. Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 27 January 2006.

²⁹⁹ First, the matter went on appeal in early 1987 to the Supreme Court of Arizona, where the application was rejected on a ratio of 3:2 (*LaGrand* judgment *supra* at para 19). The second attempt involved petitions for post-conviction relief to the Arizona State court, which were also denied (see *LaGrand* (judgment *supra* at para 20).

³⁰⁰ See *LaGrand* judgment *supra* at para 22.

³⁰¹ A writ of *habeas corpus* is a judicial mandate to a prison official ordering that an inmate be brought to court to determine if his detention is lawful and if he should be released from custody. (Lectric Law Library homepage, <http://www.lectlaw.com/def/h001.htm>. Accessed on 28 January 2006.) See also Weinman "The Clash between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An analysis of the International Court of Justice Decision in the *LaGrand* Case" (2001-1002) 17 *Am. U. Int'l L. Rev.* 857 at 881.

³⁰² See *LaGrand* judgment *supra* para 23.

had failed to notify the German Consulate of the arrest as required by the VCCR.³⁰³ This claim was rejected on the basis of the procedural default rule, a federal rule that dictates that before a State defendant can obtain relief in a federal court, the claim must be presented to a state court first.³⁰⁴ Thus a defendant could raise a new issue at federal level only if he could show 'cause and prejudice'.³⁰⁵ The purpose of the rule is to allow state courts an attempt at the issues before the federal courts intervene. The United States District Court found on the basis of the *habeas corpus* application that the LaGrands had not shown good cause or prejudice since they had failed to show an objective external factor that prevented them from raising the lack of Consular assistance earlier in the case.³⁰⁶

Despite various diplomatic efforts, Karl LaGrand was executed on 24 February 1999.³⁰⁷ On 2 March 1999, Germany filed an application with the ICJ, requesting provisional measures against the execution of Walter LaGrand.³⁰⁸ The application sought to rely on Article 1 of the Optional Protocol as a jurisdictional basis, which allows for all disputes involving the interpretation and application of the VCCR to lie within the court's compulsory jurisdiction. On the same day a letter was sent to the United States Secretary of State urging her to suspend Walter LaGrand's execution.³⁰⁹ A letter was then sent from the State Secretary to the Governor of Arizona recommending that the execution be stayed pending a final outcome of the ICJ decision. Despite such recommendation, the Governor felt it in the interests of justice

³⁰³ Article 36 of the Vienna Convention on Consular Relations, April 24 1963.

³⁰⁴ See *LaGrand* judgment *supra* para 23.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ In 1999, Germany tried various diplomatic efforts to prevent the execution of the LaGrands. The German Foreign Minister and the German Minister of Justice wrote to relevant United States counterparts, including the Governor of Arizona and the United States President on the issue of the death penalty generally. A letter followed this, from the German Foreign Minister to the United States Secretary of State referring to consular notification in the *LaGrand* case. This was two days before Karl LaGrand's scheduled execution (see *LaGrand* judgment *supra* para 26).

³⁰⁸ See *LaGrand* judgment *supra* para 30.

³⁰⁹ *Ibid.*

to go forward as scheduled.³¹⁰ On 3 March 1999, the ICJ granted a provisional order directing the United States to take all measures at its disposal to ensure Walter was not executed pending final decision in the ICJ case and that the USA should inform the ICJ of all measures taken in implementing the court order.³¹¹ On the same day, Germany brought proceedings before the U.S. Supreme Court against the Governor of Arizona, in an effort to enforce the order. The Court held that an order of the ICJ indicating provisional measures is not binding and does not furnish a basis for judicial relief.³¹² The case was thus dismissed and it was later that day that Walter LaGrand was executed.

4.2.2 The merits of the case

Two days later, proceedings in the *LaGrand* matter continued before the ICJ. What follows is a brief summary of the submissions made by Germany at the end of the oral proceedings³¹³:

1. The United States had violated its international obligations to Germany under section 36(1) of the VCCR by not informing the LaGrands of their rights under the VCCR, thereby depriving Germany of the possibility of rendering its assistance.
2. By applying rules of domestic law (the procedural default rule), and barring the LaGrands from raising their claims under the VCCR, the United States had violated its international obligation to Germany under Article 36(2), which reads:

³¹⁰ *LaGrand* judgment *supra* para 31.

³¹¹ See *LaGrand* judgment *supra* para 31 or refer to *LaGrand* (provisional measures order of 3 March 1999) at para 29. Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>. Accessed on 28 January 2006).

³¹² See *LaGrand* judgment *supra* para 33 or see the case of *Federal Republic of Germany v United States*, 526 U.S. 111 (1999).

³¹³ *LaGrand* (Memorial of the Federal Republic of Germany) at para 7.02. Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 28 January 2006.

“The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”

3. The United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the ICJ, had violated its international obligation to comply with an order issued by the court.

In pursuance of the aforesaid, Germany also submitted that:³¹⁴

4. The United States should provide Germany with an assurance that it will not repeat its unlawful acts and that in any future cases, the United States will ensure in law and practice the effective exercise of rights under Article 36 of the VCCR.

The United States did not contest the alleged breach set out in Germany’s first submission. It was the three remaining submissions that were contested, notably that Germany’s submissions were not admissible on the basis that they sought to use the ICJ as an international criminal court of appeal, which it was not.³¹⁵ The Court rejected this argument on the basis that Germany’s submissions merely sought the court to do no more than just apply the relevant rules of international law to the dispute.³¹⁶

³¹⁴ See *LaGrand* judgment *supra* para 53.

³¹⁵ See *LaGrand* judgment *supra* para 50.

³¹⁶ See *LaGrand* judgment *supra* para 52.

4.2.3 The Court's finding

As to the first submission, the court found that the United States had indeed violated section 36(1)(b), since it was clear that the United States authorities failed to inform the German Consul. It went on to find that the violation of section 36(1)(b) also creates a violation of sections 36(1)(a) and (c), since an omission by the United States had the result of preventing Germany from exercising its rights under 1(a) and (c). A further significant finding of the court on the first submission was the court's declaration on the status of section 36(1) in international law. The court stated that section 36(1) had the character of an individual right. Hence a breach of section 36(1) constituted a breach of the LaGrand's individual rights to consular assistance, not just Germany's right to information.³¹⁷

As to the second submission that the application of the procedural default rule had the effect of violating art 36(2) rights, the court began by distinguishing between the procedural default rule itself and the effect of its application. It found that the rule in itself does not violate the VCCR and merely stands as a domestic rule with a sound rationale. However, the problem arose with the application of the rule. When applied, the rule violated the international right to consular assistance by preventing the LaGrand brothers from challenging their convictions on the basis of the VCCR. The procedural default rule thus prevented full effect to be given to the purpose for which the rights were accorded under Article 36.³¹⁸

With respect to the third submission, on provisional measures, the ICJ considered the binding nature of the provisional measures in terms of Article 41 of the ICJ Statute. Taking a purposive interpretation, the court held that provisional measures are binding, the *raison d'être* being that for the court to fulfil its function of judicial settlement, its provisional measures orders must be binding.³¹⁹ Such a finding was in

³¹⁷ See *LaGrand* judgment *supra* para 74-78.

³¹⁸ See *LaGrand* judgment *supra* para 91.

³¹⁹ See *LaGrand* judgment *supra* para 102.

keeping with the long recognised principle of international law that parties before a court must abstain from any measure that would aggravate a dispute or prejudice the execution of a decision.³²⁰

The fourth and final submission led to the court's finding that a mere apology for the violations in question would be insufficient in the circumstances because of the severity of the penalties involved. The court, however, did accept a commitment by the United States to engage in specific measures to ensure the performance of Article 36 rights in future.³²¹

In summary, the ICJ held that the United States had breached its obligations to both the LaGrand brothers and Germany. It ruled that the United States violated the LaGrand brother's rights when it failed to inform them of their rights without delay. Furthermore, the United States had violated Germany's rights by depriving it of its ability to grant timely assistance to the respective accused in terms of the treaty. In addition, the United States had violated the provisional order by executing Walter LaGrand prior to the outcome of the ICJ case. As a result, the court ruled that in future cases the United States must allow review and reconsideration of the conviction and sentence where the rights of Germans are protected in Article 36.³²²

4.3 IMPLICATIONS OF *LAGRAND*

The case raises many issues on the substance and procedure of international law. The judgment touches on certain aspects of relevance to modern international law that have previously not been settled. The case also clearly demonstrates the ineffectiveness of the court to adequately protect human rights while providing general lessons for international law. (Such lessons will be discussed later in the chapter.) The following sections provide a more detailed analysis of the implication of *LaGrand* on international law.

³²⁰ See *LaGrand* judgment *supra* para 103.

³²¹ *LaGrand* judgment *supra* para 127.

³²² *LaGrand* judgment *supra* para 125.

4.3.1 Provisional measures in the ICJ

4.3.1.1 Article 41

The court, in terms of Article 41 of its Statute, is empowered to issue interim measures. This is not a *sui generis* characteristic of the court, since this power is often held by domestic courts and not an international court.³²³ There are multiple purposes for this provision: firstly and most importantly, it is aimed at the preservation of the rights that are the subject matter of the dispute. Thus the article was designed for *LaGrand*-like cases where there is an ongoing violation sought to be suspended pending the outcome of a decision of the Court.³²⁴ Secondly, it is aimed at providing urgent relief to situations that may be threatening international rights. Finally, the provision is also designed to prevent the extension of a dispute and irreparable harm.³²⁵

The problem with the provisional measures lay with the ambiguity of Article 41(1).³²⁶ The section reads as follows: “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”

The English version uses the phrase “ought to be taken”, which suggests that the parties *should take* (own emphasis) these measures, while the French version uses the words “*doivent être prises*”, which connotes that the parties *must take* these measures. The two texts, both being authoritative, had to be reconciled through a process of interpretation. The court thus turned to the Vienna Convention on the Law of Treaties

³²³ See Djajic “The Effect of International Court of Justice Decisions on Municipal Courts in the United States: *Breard v Greene*” (1999-2000) 23 *Hastings Int’l & Comp. L. Review* 28 at 35 (see fn 17).

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ It reads as follows:

“The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which *ought to* be taken to preserve the respective rights of either party.” (English version).

“*La Cour a le pouvoir d’indiquer, si elle estime que les circonstances l’exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.*” (French version).

(VCLT)³²⁷ that requires the Court to make a judgment that would best merge the two meanings. The Court thus found that the object of the ICJ statute is to facilitate the settlement of disputes and in order to do so, its provisional measures had to be binding.³²⁸

Informing the court's conclusion was the general principle of international law that parties to a case should not engage in any measure that would frustrate or prejudice the execution of a decision to be given.³²⁹ Some academics have found the use of this principle to justify an interpretation of Article 41 as arbitrary. For instance, Thirlway³³⁰ notes that it is one thing to suggest that parties to a case should not frustrate the judicial process and yet another to suggest that those parties are bound to follow that decision. On the contrary, Schabas³³¹ states that *LaGrand* is of significance to other courts precisely because the court did not confine its finding to an interpretation of Article 41, but it went ahead to cite with approval a well recognised international law principle. Thus the ICJ gave some guidance on the rationale for the binding nature of provisional measures intended to be a guideline for other courts and tribunals.

4.3.1.2 The impact of the finding on international law

There is a plethora of material on the binding nature of provisional measures. This contentious matter has divided international law academics for a significant part of the

³²⁷ 27 January 1980. Article 33(4) of the treaty mandates that:

“Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”

³²⁸ *LaGrand* judgment *supra* para 102.

³²⁹ See *Electricity case* [1939] PCIJ (ser A/B), No 79, 199 cited by the ICJ in *LaGrand judgment supra* para 103.

³³⁰ “The Indication of Provisional Measures by the International Court of Justice” in Rudolf Bernhart (ed) *Interim Measures Indicated by International Courts* (1994) 1, 30.

³³¹ (Symposium: *LaGrand*) “The ICJ Ruling against the United States: Is it really about the Death Penalty?” (2002) 27 *Yale J. Int'l L.* 445 at 449.

last century,³³² but previous jurisprudence of the ICJ on the matter is virtually non-existent. The Court has commented on compliance with provisional orders on several occasions; for example, in the *Fisheries Jurisdiction Cases*³³³ and the *Nuclear Test Cases*.³³⁴ It was only in *Military and Paramilitary Activities in and against Nicaragua Case*³³⁵ that the court came very close to any declaration of the binding nature of provisional measures. It stated:³³⁶

“When the court finds that the situation requires measure of this kind should be taken, it is incumbent on each party to take the court’s indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights.”

Schabas³³⁷ shows that it is not only the ICJ statute that suffers from ambiguity in respect to provisional orders. Take for example the European Convention on Human Rights, which is also silent on the issue. This, when combined with the fact that history has shown poor compliance with interim orders by many states, makes *LaGrand* seem all the more important. Thus, the United States were not the first to disregard an interim order of the ICJ, and neither was the ICJ the first international

³³² Kammerhofer “The Binding Nature of Provisional Measures of the International Court of Justice: the ‘Settlement’ of the Issue in the *LaGrand Case*” (2003) 16 *LJIL* 67, estimates that the debate has been going on for 80 years.

³³³ *Fisheries Jurisdiction case (United Kingdom v Iceland)* Judgment of 25 July 1974. Accessed at <http://www.icj-cij.org/icjwww/icasess/iai/iaiframe.htm> on 28 January 2006 where the court issued a provisional order on 14 August 1972, in terms of which Iceland was ordered not to take any measures to enforce the provisions of Regulation 14 July 1972 on United Kingdom vessels engaged in fishing outside a 12-mile fishery zone.

³³⁴ *Nuclear Test case (Australian v France)* Judgment of 20 December 1974. Accessed at <http://www.icj-cij.org/icjwww/icasess/iaff/iafframe.htm> on 28 January 2006, and *Nuclear Test Case (New Zealand v France)* judgment of 20 December 1974, Accessed at <http://www.icj-cij.org/icjwww/icasess/inzf/inzfframe.htm> on 28 January 2006. In these cases the court had ordered that neither government should do anything that would aggravate or extend the dispute, or have the effect of prejudicing the rights that are the subject of the dispute. In particular, it ordered that the French government should avoid nuclear tests causing the deposit of radioactive fall-out on Australia territory in the case of the Australian case and New Zealand territory in the case of the New Zealand case.

³³⁵ *Nicaragua v United States of America* judgment of 27 June 1986. Accessed at <http://www.icj-cij.org/icjwww/icasess/inus/inusframe.htm> on 28 January 2006.

³³⁶ *Nicaragua v United States of America* *supra* at para 289.

³³⁷ 2002 *Yale J. Int’l L.* 449.

tribunal to face this problem of non-compliance.³³⁸ Since the problem of non-compliance with interim orders is a frequent one, both for the ICJ's jurisprudence and for other courts and tribunals, the ICJ's finding on the issue is highly significant. The statement sent out by the ICJ in *LaGrand* to other international bodies is that interim measures to prevent irreparable harm which cannot be corrected in a final decision, are an inherent function of adjudicative bodies and must therefore be deemed to be binding.³³⁹

It would certainly seem that the matter has now been settled, but Kammerhofer³⁴⁰ raises a very significant point; that of the lack of any system of precedents and *stare decisis* in international law. He points out that among international lawyers there is consensus that there is no doctrine of *stare decisis*³⁴¹ in international law. This means that the ICJ is under no obligation to apply or interpret the law in the same way that the Court did in its earlier seating. This is supported by Article 59 of the ICJ Statute, which provides that decisions of the court have no binding effect except as between the parties and in respect of that particular case. Thus the decision of the court in *LaGrand* is only binding between Germany and the United States and any pronouncement of the law made by the court is only relevant for that particular case. The question thus follows: if this is the state of affairs, can it then be said that the ICJ settled the matter of provisional measures in *LaGrand*? Was the court's finding an authoritative declaration of international law on that point? The obvious answer would seem to be no, since the statute is clear that there is no doctrine of *stare decisis* in international law. Nonetheless, as has been articulated in Chapter 2 of this work, that international law is not only a matter of statutes, treaties and academia, but also a matter of practice. So although not bound by its decisions, the ICJ is reliant upon its past decisions to determine matters before it. This would seem pragmatic since states

³³⁸ In 1993, the Human Rights Committee had issued an order directing Canada not to extradite two death row fugitives, Charles Ng and Joseph Kindler. Canada proceeded to do so in defiance of the order (*Kindler v Canada* (1993) 15 *Human Rights Law Journal* 307, *Ng v Canada* (1994) 15 *Human Rights Law Journal* 149).

³³⁹ Schabas 2002 *Yale J. Int'l L.* 451.

³⁴⁰ 2003 *LJIL* 76.

³⁴¹ This is a formal presumption that an earlier decision must be followed in later decisions. (Kammerhofer 2003 *LJIL* 77).

appearing before the court would expect it to reason as it has done before and adjudicate with some level of continuity and stability in its reasoning.³⁴²

The declaration of the binding nature of provisional measures by the ICJ is certainly a positive step in terms of the court's injunctive authority.³⁴³ It has increased the consequences of an application for provisional measures by creating a new set of obligations for a party if the interim order is granted. This is a welcome move, since it is self-evident that if a court is to settle disputes before it, it must have the power to bind the parties that appear before it. "If a court cannot by issuing orders of an injunctive character, preserve its own ability to render an interim binding judgment, then its ability to render a final, binding judgment is illusory."³⁴⁴ By settling this issue, the ICJ has gone a long way to restore its reputation as an international court and the judgment in *LaGrand* reads more like that of a court that is the United Nations' premier judicial body.

4.3.2 Human Rights before the ICJ

The ICJ's declaration in *LaGrand* that the VCCR gives rise to individual rights raises two significant issues that directly impact current international law and not just

³⁴² *Ibid.*

³⁴³ The court's decision is however not without its problems. The ICJ's power to issue interim measures was designed for situations where there would be some element of urgency, and as such the court need only satisfy itself that it has prima facie jurisdiction. It is only at the final hearing stage that the court does an in-depth analysis of its jurisdictional power over a case. Suppose the Court satisfies itself that it has prima facie jurisdiction and the respondent complies with the interim order only to discover later that the court did not have jurisdiction. This situation would jeopardise the court's reputation, on which it is already heavily reliant because of a system where the court's jurisdiction is based on consent. Stephens ("Case Note: *LaGrand* Case" (2002) 3 *MJIL* 157) thus says the court would have to ensure that before it makes any provisional orders, it has jurisdiction over the case. Failing such assurance, a respondent may find itself prejudiced if it complies with the order and yet in breach of international law if it does not. Should the ICJ later determine in the merits phase of the case that it does not have jurisdiction, such a respondent will have no remedy. Thus Thirlway (*Indication of Provisional Measures by the International Court of Justice* 33) suggests that the power to indicate provisional measures should be qualified by a clause that the applicant will undertake to pay compensation in the event that the judgment goes against it. It is this somewhat anomalous position created by the court's finding that has led to the opinion that it will create a fear factor that will result in states withdrawing their acceptance of the ICJ's jurisdiction rather than risk adverse orders (See separate opinion of Judge Oda in *LaGrand* judgment *supra* at para 10. Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 28 January 2006.)

³⁴⁴ Quigley (Symposium: *LaGrand*) "*LaGrand*: A Challenge to the U.S. Judiciary" (2002) 27 *Yale J. Int'l L* 435 at 439.

Germany and the United States. Firstly, it highlights the fact that the ICJ is an unsuitable forum for vindicating human rights.³⁴⁵ The fact remains that only states can be parties to ICJ decisions, since individuals have no standing before the court. It is only in a case where a state's rights and the rights of its citizen are somehow linked that an ICJ case will implicate individual rights. For individuals, it is only their respective states that can assert these rights before the ICJ.³⁴⁶ Secondly, the events in *LaGrand* show that although public international law (whose main subject is the state) and private international law (whose main subject is the individual) are distinct fields, the distinction is not a watertight one.

4.3.2.1 Why the ICJ is unsuitable as a guardian of human rights?

The ICJ's finding that Article 36 rights are those that attach to individuals and not states, is a significant one. It effectively means that individuals should be able to come before their national courts to vindicate these rights where they have been violated. Clearly, an individual cannot seek to enforce his/her claim in the ICJ, and as a result he/she must rely on their respective domestic courts for enforcement. This then raises the problem of how the ICJ can ensure that its declaration is implemented by domestic courts. The binding nature of provisional measures now means the ICJ is in a better position to preserve individual rights through interim orders. But the issue of enforcement still remains undecided. Additionally, there is the problem of a remedy. There exists a well-known Latin maxim, *ubi ius ibi remedium* (where there is a right, there is a remedy) What use would this individual right be where there is no remedy for its violation?

³⁴⁵ This point of clarification is made because Germany submitted that the "United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live," adopted by a General Assembly resolution in 1985, 'confirms the view that the right of access to the consulate of the home State, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens' (*LaGrand* judgment *supra* para 75). Thus Germany argued that Art. 36 rights were not only individual rights but had assumed the status of a human right. The ICJ in *LaGrand* did not however comment on this submission, but simply confirmed that Art. 36 rights were individual rights (therefore attaching to individuals and not states, para 77 of the *LaGrand* decision *supra* note 294). It is regrettable that the court did not comment on whether Art 36 rights had gained the status of a human right because had this been found to be the case, the effectiveness of Art. 36 would have been of greater importance.

³⁴⁶ *LaGrand* judgment *supra* para 77.

On the one hand, it is recognised that the ICJ is designed to have jurisdiction over states and not individuals. So in theory, the issue of human rights is not central. However, the problem still remains, where a case before the ICJ does in fact implicate individual rights, especially where human life hangs in the balance, what is the correct remedial action that the court could take without overstepping its mandate?³⁴⁷ The issue of a suitable remedy was covered in the judgment only to a point. The Court found that the United States is under a duty to “allow review and reconsideration of the conviction and sentence by taking account of the violation set forth in the convention”.³⁴⁸ The court did not, however, specify the exact content of the duty, leaving the means to the United States. According to Fitzpatrick and Quigley,³⁴⁹ it is regrettable that the ICJ did not give more prescriptive remedies for those whose Art. 36 rights have been violated. However, a bolder move would have met much opposition because it would seem as though the ICJ was dictating to the U.S. courts how to manage their criminal justice system. It can only be that the Court adopted a cautionary approach so as to avoid allegation of undue intrusion into domestic law matters.

So it can be seen that despite the fact the court can now grant injunctive relief to those who seek interim orders, the ICJ is still ill-suited to be a forum for the preservation of human rights, especially human life. Not only is the enforcement of the decision of individual rights uncertain, but the issue of the appropriate remedy is still a point of contention.

³⁴⁷ Germany asked the court to order the United States to give three assurances: Firstly, not to repeat the violations, secondly to ensure effective exercise of consular rights and finally to provide for effective review of and remedies for criminal convictions (*LaGrand* judgment *supra* para 117). In response to this, the United States raised an objection, on the basis that this would be an unorthodox use of the ICJ’s remedial powers. The court rejected this argument, finding that where there is a basis for jurisdiction over as a matter, the court does not need separate jurisdictional basis to determine the appropriate remedies (*LaGrand* judgment *supra* para 48).

³⁴⁸ *LaGrand* judgment *supra* para 125.

³⁴⁹ Quigley 2002 *Yale J. Int’l L* 435. Fitzpatrick (Symposium: *LaGrand*) “The Unreality of International Law in the United States and the *LaGrand* Case” (2002) 27 *Yale J. Int’l L* 427.

4.3.2.2 The intersection of norms in international law

Germany founded the jurisdictional basis of its claim on article 1 of the Optional Protocol to the VCCR.³⁵⁰ The application thus turned on the interpretation of Art. 36 of the VCCR, but in the course of their argument Germany alluded to general principles of international law relevant to the application; such as the rights to due process and human rights factors. The United States, however, preferred to contain their argument to the interpretation of the treaty.³⁵¹ Two distinct opposing views of the international law thus emerged in the case. On the one hand was a view to the effect that international law consists of water-tight compartments as demonstrated by the U.S. argument; on the level of sources, customary international law and treaty law exist separately: likewise, with respect to rights and obligations, inter-state rights may never converge with the rights of individuals.³⁵² Thus consular rights must be understood as the rights of a state and not an individual. The two may not converge.³⁵³ Germany argued the very opposite, proposing that treaties are not self sufficient but may interact with other international norms in their application.³⁵⁴ Thus Germany's position was that relations involving states cannot be seen in isolation: states exist because of and for individuals, and it thus follows that their relations will affect individuals.³⁵⁵ Monica Feria Tinta³⁵⁶ points out that multilateral treaties are now a complex web of intertwining rights and duties not just of states, but, more recently, those of individuals. *LaGrand* is thus an example of this. The VCCR, itself a multilateral treaty, primarily concerns state-to-state obligations. But it is now clear from the decision in *LaGrand* that Art. 36 of the Convention confers rights on individuals. In sum, the VCCR is a treaty that intertwines the rights of both states and

³⁵⁰ Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

³⁵¹ See Tinta "Due Process and the Right to Life in the context of the Vienna Convention on Consular Relations: Arguing the *LaGrand* case" (2001) 12 No. 2 *EJIL* 363 at 366.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ Monica Feria Tinta 2001 *EJIL* 365.

³⁵⁶ Monica Feria Tinta 2001 *EJIL* 367.

individual. It is thus clear that a worldview presupposing that international norms are of no concern to treaty interpretation cannot be correct. The reality of contemporary international law is that interstate relations take place in a world populated by individuals and as a result individuals are often affected by breaches of these international obligations.³⁵⁷

Previous academic surveys have been conducted of the ICJ jurisprudence on provisional measures and it is said that the results display a growing tendency of the court to recognise the human realities behind disputes involving States.³⁵⁸ The case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*³⁵⁹ and the *Case Concerning the Frontier Dispute*³⁶⁰ are examples of cases that illustrate the growing humanitarian nature of ICJ jurisprudence.³⁶¹ The cases both involved disputes regarding territory, yet the court makes reference in its order to the possible risk of irreparable harm to persons and property. The *Land and Maritime Boundary* case was a dispute over the Bakassi Peninsula in which Cameroon filed an application with the ICJ after armed conflict had taken place in the territory. The court acknowledged that the rights in issue were sovereign rights of the two states, but it went on to add that these rights affected persons.³⁶² In the *Frontier Dispute* case, the court remarked that armed actions in the disputed territory form a justifiable basis for the court to issue an order of provisional measures, since a failure to do so will expose the persons and property of that area as well as the interests of the states to serious risk of irreparable damage.³⁶³ The ICJ's bold declaration in *LaGrand* stands as a

³⁵⁷ Monica Feria Tinta 2001 *EJIL* 368.

³⁵⁸ Higgins, "Interim Measures for the Protection of Human Rights" in Charney *et al* (eds) *Politics, Values and Functions : International Law in the 21st Century, Essays in Honor of Professor Louis Henkin* (1997).

³⁵⁹ (*Cameroon v Nigeria: Equatorial Guinea intervening*)(Provisional Measures Order of 15 March 1996). Accessed at <http://www.icj-cij.org/icjwww/idocket/icn/icnframe.htm> on 28 January 2006.

³⁶⁰ (*Burkina Faso v Mali*) (Provisional Measures Order of 10 January 1986). Accessed at <http://www.icj-cij.org/icjwww/icasas/iHVM/iHVMframe.htm> on 28 January 2006.

³⁶¹ Stephens 2002 *MJIL* 92.

³⁶² (*Cameroon v Nigeria*) (Provisional Measures Order of 15 March 1996) para 39. Accessed at <http://www.icj-cij.org/icjwww/idocket/icn/icnframe.htm> on 29 January 2006.

³⁶³ (*Burkina Faso v Mali*)(Provisional Measures Order) *supra* at para 21. Accessed at <http://www.icj-cij.org/icjwww/icasas/iHVM/iHVMframe.htm>.

further example of the court's recognition of the human realities behind state conflicts.

The cornerstone of the *LaGrand* case was undeniably the interpretation of the VCCR. Irrespective of this, the vindication of the rights of the *LaGrand* brothers was also a concern. Whether this is recognised or not, the observance of human rights in the international legal field has become of prime importance even by institutions not created to defend human rights *per se*. So whether one finds that the case was essentially about Germany's rights or the rights of its citizens, the case nonetheless illustrates that interests of individuals may intersect with those of states so that a decision of the ICJ may have a very real effect on specific individuals, albeit indirectly.

4.4 BEFORE AND AFTER *LAGRAND*

LaGrand was not the first time the issue of provisional measures, or violations of the VCCR had come under the spotlight. The case is a landmark contribution in a trilogy of cases that have appeared before the court on the basis of an almost identical series of events. It is important to consider these cases as they show the steady evolution of the problem, beginning with *Breard*, followed by *LaGrand* and finally *Avena*.

4.4.1 The case of *Angel Breard*³⁶⁴

On 1 September 1992, Virginia authorities arrested a Paraguayan national, Angel Breard, for murder.³⁶⁵ Breard was not informed of his rights in terms of the VCCR and he was subsequently convicted and sentenced to death.³⁶⁶ The execution was

³⁶⁴ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States)* (judgment of 10 November 1998). Accessed at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm> on 29 January 2006 (hereinafter referred to as *Breard*).

³⁶⁵ *Breard* (pleadings of the Republic of Paraguay 9 October 1998) at para 2.1. Accessed at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm> on 29 January 2006.

³⁶⁶ *Breard* (pleadings of the Republic of Paraguay) *supra* at para 2.10 and 2.12.

scheduled to be on 14 April 1998.³⁶⁷ Like the LaGrand brothers, Breard tried various efforts for relief in the federal courts: he appealed his case to the Virginia Supreme Court, then to the United States Supreme Court. Both these efforts failed so he filed a petition for a writ of *habeas corpus* in a Circuit court.³⁶⁸ All claims were dismissed. It was only in April 1996 that the Paraguayan Consuls learnt of Angel's Bread's conviction and sentence.³⁶⁹ They thus began to render assistance, which included numerous applications in the United States district court and appeal courts and various diplomatic efforts, which all came to naught.³⁷⁰ On 3 April 1998, Paraguay brought an action before the ICJ and sought a provisional measures order from the court directing the United States to ensure that Breard was not executed pending the disposition of the case in the ICJ. After establishing that the United States had indeed failed to inform Angel Breard of his rights, the Court made the following provisional order:

“The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the court of all the measures which it has taken in implementation of this Order...”³⁷¹

Breard then sought to have the order enforced in the Supreme Court and the Court dealt with the application in the case of *Breard v Greene*.³⁷² The Court denied Breard relief on the grounds that his failure to raise the violation in the Virginia State courts barred him from raising the violation in federal proceedings.³⁷³ The Court went on to add that even if the matter were justiciable, Breard would have to prove that the omission on the part of the United States authorities prejudiced his case.³⁷⁴ The Court

³⁶⁷ Weisburd “International Courts and American Courts” (1999-2000) 21*Mich. J.Int'l. L* 877 at 880.

³⁶⁸ *Breard* (pleadings of the Republic of Paraguay) *supra* at para 2.12, 2.13, 2.14.

³⁶⁹ *Breard* (pleadings of the Republic of Paraguay) *supra* at para 2.16.

³⁷⁰ *Breard* (pleadings of the Republic of Paraguay) *supra* at para 2.18.

³⁷¹ *Breard* (provisional measures order of 9 April 1998) *supra* at para 41. Accessed at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm> on 29 January 2006.

³⁷² 523 U.S. 371 (1998).

³⁷³ *Breard v Greene supra* at 375-379.

³⁷⁴ *Breard v Greene supra* at 374.

held that on the facts it was not possible to make such a conclusion. In effect the Court was saying that Breard had not shown that Consular access would have helped his case in any event.

What is interesting about the Supreme Court's analysis of the facts in *Breard v Greene*³⁷⁵ is that it did not discuss or comment on the effect of the ICJ's provisional order except in passing, as "a request". It can only be assumed from these facts that the court did not consider it bound to honour the order at all. Weisburd³⁷⁶ points out that although the Supreme Court did not discuss the legal effect of the ICJ's interim order, it is implicit in its denial of Bread's petition that it did not consider it bound to the order.

Despite the ICJ order, Bread was executed on 14 April 1998. In pursuance of the matter, the case returned to the ICJ, this time on different pleadings.³⁷⁷ However, late 1998, after submission of its memorial, the Government of the Republic of Paraguay informed the court that it did not wish to continue with the proceedings. Accordingly the court made an order regarding the discontinuance of the matter and the removal of the case from the Court's list. As a result of this discontinuance, the ICJ did not have the opportunity to deal with the issue on the merits and could not therefore rule on the status of provisional measures. The *Breard* case is worth mentioning nonetheless because it was the first of the trilogy of cases and it clearly shows the attitude of the United States with respect to the ICJ's interim orders. *Breard* is also important as a backdrop to the current thesis because it shows the prevalence of the problem of consular rights notification.

³⁷⁵ *Supra* at 374.

³⁷⁶ 1999-2000 *Mich. J. Int'l. L* 882.

³⁷⁷ Paraguay raised three claims before the court:

- The United States had violated Article 36(1) of the VCCR and as a result Paraguay sought a declaration and reparations (Memorial of the Republic Of Paraguay in *Breard supra* at para 1.5 & 1.6).
- The United States breached Article 36(2) of the VCCR by invoking the municipal procedural default rule, thereby preventing Angel Bread from raising his action in the federal courts (Memorial of the Republic Of Paraguay in *Breard supra* at para 1.7).
- The United States had breached a binding order of the ICJ by failing to carry out the provisional measures order issued by the court and going ahead with the execution (Memorial of the Republic Of Paraguay in *Breard supra* at para 1.9).

4.4.2 The case of *Avena and Other Mexican Nationals*³⁷⁸

According to the judgment of 31 March 2004, the facts in *Avena* are briefly as follows: 52 Mexican nationals had been detained with no notice of their consular rights under the VCCR, and only in two cases had the nationals been informed, such information however not being given “without delay” as required by Art. 36(1)(b).³⁷⁹ 49 out of the 52 cases were at the time of the application at various stages of proceedings before the United States judicial authorities.³⁸⁰ In three cases, judicial remedies within the United States had already been exhausted and for fear that executions may follow, the ICJ made a provisional order in respect of these three cases.³⁸¹ The court ordered unanimously that³⁸²:

- a) “The United States *shall take all measures necessary* (own emphasis added) to ensure that Mr. Cesar Roberto Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings.
- b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.”

The court noted, however, that by the time it issued its judgment on the merits, the Oklahoma Court of Appeals had already set an execution date for Torres.³⁸³ This move is of great concern because for the third time running, a U.S. court had shown blatant disregard for an order issued by the ICJ. The essential difference between the Oklahoma court and the U.S. courts in *LaGrand* and *Breard* is that in the current

³⁷⁸ *Avena and Other Mexican Nationals (Mexico v United States of America)* judgment of 31 March 2004 (hereinafter referred to as *Avena*). Accessed at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> on 27 January 2006.

³⁷⁹ *Avena* (judgment of 31 March 2004) *supra* at para 19.

³⁸⁰ *Avena* (judgment of 31 March 2004) *supra* at para 20.

³⁸¹ *Avena* (judgment of 31 March 2004) *supra* at para 21.

³⁸² *Avena* (judgment of 31 March 2004) *supra* at para 3.

³⁸³ *Avena* (judgment of 31 March 2004) *supra* at para 21.

matter, the court disregarded the ICJ order in the face of an absolute declaration of the binding nature of ICJ provisional measures orders. This then begs the question: what is the impact of the *LaGrand* decision for U.S. criminal proceedings? This will be the subject of Chapter 5 of this thesis.

Before the court, Mexico requested the usual pronouncements as to the violations of Article 36. However, it went further by asking the court to declare that Mexico be entitled to full reparations for injuries sustained by the detainees in the form of *restitutio in intergrum*.³⁸⁴ It was argued that, in the circumstances, restitution would consist of an obligation to restore the status quo by annulling the convictions and sentences of the detainees.³⁸⁵ The crux of Mexico's argument before the court was twofold. Firstly, Mexico argued that since the decision in *LaGrand* no changes had been made to the procedural default rule and that the rule continued to act as a bar to Article 36 claims.³⁸⁶ Secondly, whilst the U.S. had been given discretion with respect to the correct remedy, the remedy chosen was not adequate. It was common cause that the U.S. after *LaGrand* decision employed review and reconsideration by way of clemency as a remedy to Article 36 violations. However Mexico argued that this method was insufficient as a remedy for Article 36 violations since it did not present any real legal benefit to a foreign defendant.³⁸⁷

The court found in a decision of 14 in favour, 1 against, that the United States had violated its Article 36 obligations, in some though not all cases. It found that the application of the procedural default rule still had the effect of violating Article 36 rights. As to the issue of review and reconsideration, the court rejected Mexico's claim that *restitutio* required annulment of convictions and sentences. The court reiterated that its role is not to determine the correctness of a sentence or conviction but to interpret Article 36, thereby leaving the issue of the correct remedy to the U.S. government.³⁸⁸ However, it found that clemency procedures were insufficient means

³⁸⁴ *Avena* (judgment of 31 March 2004) *supra* at para 12(2).

³⁸⁵ *Avena* (judgment of 31 March 2004) *supra* at para 14(5).

³⁸⁶ *Avena* (judgment of 31 March 2004) *supra* at para 111 & 112.

³⁸⁷ *Avena* (judgment of 31 March 2004) *supra* at para 135.

³⁸⁸ *Avena* (judgment of 31 March 2004) *supra* at para 122 & 123.

of review and reconsideration, especially in the face of the procedural default rule.³⁸⁹ It went on to comment that effective review and reconsideration in the *LaGrand* sense should be achieved within the overall judicial proceedings.³⁹⁰ So without directing which remedy should be adopted, the ICJ in *Avena* revealed that the intention is to provide a judicial, not a political, remedy for violations of Article 36 rights. This suggests that implementation of the ICJ judgments should take place within the confines of the judicial system. This idea is expanded upon in Chapter 5.

Avena in one sense simply reaffirmed the principle set out in *LaGrand* that a state may not invoke its municipal legal structure to excuse or justify violations of international law.³⁹¹ Yet in another, *Avena* is an advancement from *LaGrand* in that the court took a bolder step of ordering that the court should take “measures necessary” as opposed to measures at its disposal, as was the case in *LaGrand*. Thus in *Avena*, the Court took a stronger stance by using the more injunctive term “measures necessary” than the more discretionary “measures at its disposal”. This seemingly small move shows the Court’s dissatisfaction with United States response to ICJ orders in the past.

Avena was a step up from *LaGrand* in more ways than one. Mexico’s application resembled that of the United States and Paraguay, in that they requested a guarantee of non-repetition. However, two further remedies were requested.³⁹² Firstly, Mexico asked the court to order that the United States take whatever steps were necessary and sufficient to ensure that its municipal law enables full effect to the purposes for which the rights in Article 36 are intended.³⁹³ Secondly, it asked that the United States

³⁸⁹ *Avena* (judgment of 31 March 2004) *supra* at para 142.

³⁹⁰ *Avena* (judgment of 31 March 2004) *supra* at para 140 & 141.

³⁹¹ Sloane “Measures necessary to Ensure: The ICJ’s Provisional Measures Order in *Avena and Other Mexican Nationals*” (2004) 17 *L JIL* 673 at 674.

³⁹² *Avena* (Application Instituting Proceedings of 9 January 2003) at para 281. Accessed at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> on 27 January 2006.

³⁹³ *Avena* (Application Instituting Proceedings) *supra* at para 281. It would seem that Mexico was pushing to have the United States take action, since after *LaGrand* no moves had been taken by the United States to reform the application of the procedural default rule in cases where there had been consular rights violations.

should establish meaningful remedies at law for violations of Article 36 rights.³⁹⁴ One gets the sense that Mexico was seeking to ensure that the United States would have no conceivable justification for digressing from any orders made by the Court this time. With respect to the request for provisional measures, Mexico went so far as to prove ways in which the United States could ensure compliance with any measures ordered by the ICJ. Mexico cited academic commentaries, federal cases and the United States Constitution, to demonstrate that the United States had ample means at its disposal to ensure that its authorities comply with ICJ provisional orders.³⁹⁵

Thus, in many respects, the *Avena* case went further than its predecessors. According to Sloane,³⁹⁶ *Avena* weighed heavily before the court for two reasons: firstly, the gravity of the claim was heightened by the fact that Mexico and United States share a border. In its application, Mexico highlighted that because of its geopolitical proximity and the frequent interstate relations between the two countries, a reciprocal consular convention had been signed 20 years before the VCCR.³⁹⁷ As a result of a well-established relationship, Mexico had acquired 45 consulates throughout the United States, as compared to Germany and Paraguay who had only nine consulates each.³⁹⁸ Secondly, the form and substance of Mexico's application was considerably different from Germany and Paraguay. As a starting point, it covered in detail the importance of consular assistance in Mexico's domestic law and the prior efforts of Mexico to obtain relief for its detained nationals.³⁹⁹ The detail with which Mexico addressed the matter was reflected in the length of the application, which ran to more than 70 pages, while Germany and Paraguay had applications totalling less than 10 pages.⁴⁰⁰

³⁹⁴ *Avena* (Application Instituting Proceedings) *supra* at para 281.

³⁹⁵ Sloane 2004 *L JIL* 678.

³⁹⁶ Sloane 2004 *L JIL* 676.

³⁹⁷ *Avena* (Application Instituting Proceedings) *supra* at para 23.

³⁹⁸ *Avena* (Application Instituting Proceedings) *supra* at para 23.

³⁹⁹ *Avena* (Application Instituting Proceedings) *supra* at para 29-66.

⁴⁰⁰ Sloane 2004 *L JIL* at 677.

Finally a noteworthy observation in *Avena* was the following comment made by the court:

“...the fact that in this case the Court’s ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.”⁴⁰¹

After three cases coming before the court on strikingly similar set of facts, it is not surprising that the court felt it necessary to clarify the general applicability of its findings. The implications of *Avena* cannot be overemphasised. It is disturbing that within four years, three cases alleging the same violations by the same nation should appear in the ICJ. This was bound to seize the attention of the international community. *Breard* gained the attention of many academics, but because the Court was unable to settle the many issues raised, much remained hanging in the balance. This left the international community waiting with bated breathe for resolution. *LaGrand* was thus welcomed and drew much attention, mainly because of the ruling on the binding nature of provisional measures. *Avena*, however, stands as a symbol of the gravity of the issues raised by *LaGrand and Breard* and the prevalence of consular rights violations in the United States. This trilogy of cases has thus come under the spotlight and is well worth analysing, as they have enduring implications for international law.

4.5 LESSONS FROM THE TRILOGY OF CASES

The trilogy serves as a good example of the changing international legal landscape. These changes can be attributed to a host of factors that have been classified under the rubric of globalisation. Two aspects of the decisions clearly demonstrate changing mindsets about how international law should be framed. This is with respect to the international law/ national law dichotomy and also the administration of the death penalty.

⁴⁰¹ *Avena* (Judgment of 31 March 2004) *supra* at para 151.

4.5.1 The international law versus domestic law

The issues raised by the three cases can be placed in a wider framework of international law to illustrate the intersection of international law with municipal law. For instance, the cases deal with the obligation of municipal courts to take into account decisions of the ICJ and the effect of ICJ decisions on municipal courts, and it demonstrates how municipal law doctrines can come under international scrutiny. All the above thus reveal that there are no clear demarcation lines between international law and domestic law.

4.5.1.1 Reconciling the two systems

Chapter 2 of this thesis considered the monist-dualist debate and it was suggested that a more practical analysis of the international law/municipal law dichotomy was preferred. It was argued that international law as a system has developed sufficiently for there to be set principles that can be used to reconcile international law with domestic law, based on established practice. The trilogy is an apt example. The cases show that the application of a domestic law rule (the procedural default rule) could result in the violation of an internationally protected right (the consular rights), so that there is effectively a clash between the two systems of law. To this, the monist would say the United States should comply with international measures because international law and domestic law are a single concept.⁴⁰² The dualist, on the other hand, would argue that the United States is only obliged to disregard the procedural default rule if that is so permitted by legislation because international law and domestic law are two different fields.

It was shown in Chapter 2 that neither perspective adequately resolves the problem of what to do when there is a conflict. The monist solution to the problem raised by the trilogy is unsatisfactory because as a starting point the trilogy seems to nullify the monist's fundamental presupposition, by illustrating that international law and

⁴⁰² See Dugard *International Law: A South African Perspective* 2nd ed (2001) 43 for a discussion of the theories of monism and dualism.

national law are not in fact a single concept, which is why they can clash. In addition to this, the idea that U.S. courts are bound to apply international decisions simply because they are international is also unacceptable. The dualist solution, although more plausible, is also unsatisfactory. Whilst United States legislation does not permit a U.S. court to disregard the procedural default rule, the U.S. remains nonetheless bound to review and reconsider both the sentence and convictions of foreign detainees where there has been a lack of consular notification, irrespective of whether their claim has been procedurally defaulted or not. Consequently, the dualist solution is no solution at all.

To resolve a conflict one must pay regard to the practice of states in international law. The Court in *LaGrand* raised the well recognised principle of international law that states should refrain from any action that would frustrate the outcome of a decision.⁴⁰³ If U.S. courts continue to apply the procedural default rule despite the ICJ rulings in the trilogy, this would have the effect of frustrating the outcome of the case. Hence proper international law practice demands that the United States refrain from applying the procedural default rule when it prevents review and reconsideration of the accused's sentence and conviction. This conclusion should not be interpreted as hegemonic because the United States has consented to the jurisdiction of the ICJ and it is a signatory to the VCCR.

4.5.1.2 The position of the ICJ vis-à-vis municipal law

After *LaGrand*, it was contended that the ICJ's institutional integrity was brought into question.⁴⁰⁴ The consensual nature of the ICJ places it at the whim of its member states. Whilst the court has incredible power and influence as the United Nations' premier judicial body, its institutional integrity remains of paramount importance, since its jurisdiction is purely consensual. As a result, the Court must act only within its power to act and it must strictly stand by its role in the international community.

⁴⁰³ *LaGrand* judgment *supra* para 103.

⁴⁰⁴ See Schabas 2002 *Yale J. Int'l L.*

As a general rule, provisional measures orders affect matters traditionally understood as concerns of international law;⁴⁰⁵ matters such as the rights and duties of states as they interact in the international arena. In the *Nuclear Test*⁴⁰⁶ case the court ordered France to refrain from nuclear tests causing the deposit of radioactive fallout on Australian territory. In *Passage through the Great Belt*⁴⁰⁷, it denied Finland's request for an order that Denmark should refrain from continuing with construction works that would hamper the passage of ships in the East Channel. Finally, there are the classical territorial disputes involving sovereignty rights.⁴⁰⁸ Such are the usual subjects of the ICJ decisions.

On the surface, the trilogy is concerned with the violation of the Art. 36, but at the same time it brought the U.S. criminal justice system under scrutiny. This meant the ICJ had to exercise caution in resolving the matter to avoid a situation where the ICJ intrudes in domestic law by substituting its judgment for decisions of the U.S. courts. The court would thus be placing itself as an international court of appeal, which it is not empowered to do.⁴⁰⁹ To this end, the court would be exceeding its legitimate authority both in terms of its own statute and article 2(7) of the UN Charter, which states that nothing contained in the Charter authorises intervention in matters which are essentially within the domestic jurisdiction of any state.

Those who suggest that the ICJ played the role of an appeal court in the trilogy are not without justification. An order requiring the stay of proceedings, or directing the review and reconsideration of sentences and conviction, are typically the orders of an appeal court. Despite any appearances, the subject of the cases was the Vienna Convention.⁴¹⁰ The court's decision did implicate matters of domestic criminal

⁴⁰⁵ Sloane 2004 *L JIL* at 683.

⁴⁰⁶ *Nuclear Tests (Australia v France)*. Accessed at <http://www.icj-cij.org/icjwww/icas/iaf/iafframe.htm> on 27 January 2006.

⁴⁰⁷ *Passage Through the Great Belt (Finland v Denmark)*. Accessed at <http://www.icj-cij.org/icjwww/icas/ifd/ifdframe.htm> on 27 January 2006.

⁴⁰⁸ For example, see the more recent case involving *Sovereignty over Pedra Branca Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia v Singapore)*. Accessed at <http://www.icj-cij.org/icjwww/idocket/imasi/imasiframe.htm> on 27 January 2006.

⁴⁰⁹ *LaGrand* judgment *supra* at para 51.

⁴¹⁰ Sloane 2004 *L JIL* at 684.

procedure, but this was not due to an inappropriate exercise of the court's power. Rather, it was an inevitable result of the sequence of events that took place in the cases. The trilogy thus shows that the ICJ must operate within its boundaries, but there are instances when the boundary lines are blurred because of the intertwining of rights and obligations in a case. It is my opinion that the Court found the balance in *LaGrand* by declaring the violation and interpreting the VCCR, but leaving the question of an appropriate remedy to the U.S. Even after the ICJ showed its disapproval of clemency as a remedy in *Avena*, it was not regaining control of the matter so much as it was clarifying the Court's intention in *LaGrand*.

4.5.2 The death penalty issue

It is undoubtedly the death penalty factor that makes the trilogy of greater concern. This is understandably so considering the irreversibility of the punishment and the wide international disapproval of this method of punishment.⁴¹¹ Inherent in such a matter is the likelihood that the Court would take a stronger position against the United States, not because of the violations that are the subject of the case, but because of the fact that human life was at stake. Yet the court in *Breard* seemed at pains to emphasise that it was not attempting to unduly expand its jurisdiction in this way, saying: "The issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes..."⁴¹² The court sought to avoid the contentious issue of the death penalty, but the comment made by one of the judges shows that this matter was simply unavoidable in the circumstances. The same tendency can be seen in *LaGrand*. In a separate opinion, Vice-President Shi⁴¹³ commented as follows:

⁴¹¹ See Schabas 2002 *Yale J. Int'l L.* 445.

⁴¹² *Breard* (Provisional Measures Order of 9 April 1998) *supra* at para 38.

⁴¹³ See separate opinion of Vice-President Shi in *LaGrand* judgment *supra* at para 17. Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>. on 27 January 2006.

“I should like to make it clear that it was not for reasons relating to the legal consequences of the breach of Article 36(1)(b), that I voted in favour of the ICJ’s conclusion on Germany’s assurance and guarantee submission. This [conclusion] is of particular significance in a case where a sentence of death is imposed, which is not only a punishment of severe nature but also one of an irreversible nature.”

Notwithstanding arguments to the contrary, the death penalty issue weighed heavily before the court. Capital punishment has fallen into disuse as part of a criminal justice system in almost all of Europe, most of Latin America and much of Africa. Japan and the United States are the only two developed countries that still retain the death penalty.⁴¹⁴ Statistics of the Secretary General of the United Nations show that two thirds of the world has abolished the death penalty.⁴¹⁵ The Inter-American Commission on Human Rights, European Court of Human Rights and the United Nations Commission on Human Rights have all spoken against the death penalty. All of the above point to an international community that is opposed to the death penalty. Schabas⁴¹⁶ suggests that it is evident that the death penalty was only a subtext issue in *LaGrand*, but it remains a decision that has advanced the protection of individuals facing capital punishment.

Germany sought to emphasise that its application was not directed against capital punishment; neither in general, nor in regard to the way in which the death penalty is applied in any particular country.⁴¹⁷ However, there can be little doubt that the willingness of Germany to bring the case before the ICJ was influenced by the death penalty factor; firstly because of its own view of capital punishment,⁴¹⁸ and also

⁴¹⁴ Schabas 2002 *Yale J. Int’l L* at 445.

⁴¹⁵ See Report of the Secretary-General, “Capital Punishments and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty,” U.N. ESCOR, U.N. Doc. E/2000/3 (2000). Accessed at <http://www.un.org/esa/coordination/ecosoc/doc2000.htm#E1> on 27 January 2006).

⁴¹⁶ 2002 *Yale J. Int’l L* at 452.

⁴¹⁷ *LaGrand* (Memorial of the Federal Republic of Germany) *supra* at para 1.08 .Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 27 January 2006.

⁴¹⁸ Article 102 of the Basic Law of the Republic of Germany expressly abolishes capital punishment.

because of the irreparable nature of the punishment. Whether the trilogy is in actual fact about the death penalty is mere speculation. The certainty, however, is that in the years to come defenders of the death penalty will come under severe pressure for the administration of that form of punishment. This pressure will come in the form of insistence that the United States give nationals facing capital punishment the maximum level of due-process protection, in accordance with international law standards.

International law, which once was seen as exotic and idealistic, has been instrumental in the reformation of laws for capital punishment. Sandra Babcock points out that capital punishment litigators have now begun to invoke international treaties and customary international law in state and federal courts across America.⁴¹⁹ As a result of this, domestic courts are having to review decisions of international tribunals and foreign courts. Babcock argues that international law has had measurable effects in capital cases and has been the cause for the growing unease with the administration of capital punishment in the USA. She uses the VCCR as a prime example, showing that in such cases numerous executions might have gone unnoticed by the world were it not for the fact that the detainees had not been informed of their consular rights.

4.6 CHAPTER CONCLUSION

Breard, *LaGrand* and *Avena* are cases that involved the enmeshment of various delicate matters of international concern: the boundaries of the ICJ's power, the balance between international law and domestic law, the administration of the death penalty and the issue of international norms in treaty interpretation. Chapter 4 has thus shown that the trilogy of cases discussed has awakened the ICJ's injunctive authority. By declaring that interim orders of the ICJ are binding, the Court was re-establishing its role as a court in international law. This chapter also highlighted the issues surrounding the three cases and the arguments raised by the parties before the Court that demonstrated the fact that international law cannot be compartmentalised. Consequently, the ICJ might have to consider individuals' rights in the process of its decision making, although individuals do not have standing in the court. In the same

⁴¹⁹ Babcock "The Role of International Law in U.S. Death Penalty cases" (2002) 15 *LJIL* 367.

way, customary international norms may be raised in the process of treaty interpretation. This is not to say, however, that the ICJ is suited to adjudicate on matters involving individual rights. Finally, the chapter showed that in the trilogy the ICJ had to engage in an exercise of balancing international law with domestic law. It was submitted that the Court did this well, achieving the balance between mere intrusion and supervision. Finally, the chapter showed that the death penalty issue was unavoidable. It was also submitted that whilst shedding light on the nature of the rights and obligations contained in the VCCR, the trilogy also showed that states that choose to retain the death penalty as a method of punishment shall be subject to greater international scrutiny.

The cases very clearly demonstrate the tensions that can exist between international law and domestic law; more specifically, the role of international institutions vis-à-vis domestic institutions and the coexistence of conflicting legal and moral norms in the international arena. The aim of the next chapter is to see if these tensions can be minimised through the arm of domestic judicial process. The Chapter will also attempt to answer some questions that still linger after the Court's judgments. If the ICJ Statute requires the United States to give domestic effect to ICJ judgments, is such a move constitutional? In addition, is it fair to subordinate national courts to ICJ decisions and at what cost?⁴²⁰ The fact that the problem concerning the VCCR has appeared three times in the ICJ means that the issues it raises are not just of academic significance, but have much practical import. As mentioned in a previous chapter, globalisation and the resulted increase in international communication places a greater need to reconcile any tensions between international law and domestic law, or at least to resolve any such conflicts. Nations are becoming more entwined every day and with this process clashes between systems will only become more apparent.

⁴²⁰ Weisburd 1999-2000 *Mich. J.Int'l. L* at 878.

CHAPTER 5

ENFORCEMENT OF THE ICJ DECISIONS IN *LAGRAND* AND *AVENA*

Contents

1 Introduction

2 Who Should Enforce the Decision

3 Enforcement by the U.S. National Court

4 The Response of U.S. Courts to the ICJ Decisions

5 Barriers to Enforcement

6 Conclusion

5.1 INTRODUCTION

The previous chapter showed that the ICJ in *LaGrand* made significant rulings on the nature of the rights found in the Vienna Convention. This was the first step towards the vindication of the rights. An equally important aspect of concern in any ruling is the implementation of the ruling. It is here that the schism between international law and domestic laws becomes more evident. The aim of this chapter is to highlight the problems faced by states and more specifically state courts in the enforcement of international decisions. It will thus consider the response of the United States to the ICJ decision.

The ICJ in *LaGrand* not only left the form of remedy to the United States, but it also did not specify which branch of the government should implement the decision. It thus remains unclear whether the Court intended the American legislature to reformulate the procedural default rule to allow the courts to hear *LaGrand*-like cases, or if the executive should exercise its powers to prevent violations in future cases, or if the courts should apply the law in VCCR cases in conformity with the interpretation

of the treaty in *LaGrand*. The chapter therefore begins by addressing this issue. It is argued that although *LaGrand* does not show which branch of the government should implement the decision, *Avena* tends to suggest that the ruling was directed at the national courts. The focus is then placed on the response of the U.S. courts to the ICJ decision in order to reflect upon the attitudes of judges in municipal courts towards the International Court. Finally, the chapter looks at the hurdles that a national court would encounter were it to directly implement a decision of the International Court.⁴²¹

Accordingly, the following issues are the subject of this chapter:

1. Which arm of government is best suited to implement the ICJ decision in *LaGrand*? More specifically, is the judiciary the correct institution to deal with the matter, or should it be deferred to the political branch, especially since the case involves foreign affairs?⁴²²
2. If United States Courts is required to give effect to the ICJ decisions, does their Constitution permit this?⁴²³
3. Would the above scenario not amount to the subordination of U.S. Courts to the ICJ?⁴²⁴

The fact that VCCR violations have been raised, not once or twice but three times, is indicative that the matter must now be raised from the level of an academic discussion to a level of practical import. It must be noted that U.S. responses to international adjudication is an extensive topic that could be the subject of its own paper. In this

⁴²¹ The United States Supreme Court granted *certiorari* (a writ issued by a United States appellate court to a lower court in order to review its judgment for legal error, See Wikipedia, accessed at <http://en.wikipedia.org/wiki/Certiorari>) in *Medellin v Dretke* (125 S. Ct 2088 (2005)) to address two questions: whether the United States is bound by the ICJ's treaty interpretation in *Avena* and if not, whether the U.S. courts are in any event obliged to defer to the ICJ's decision in the interest of comity and uniformity. The main issues in this chapter may have been settled by the U.S. Supreme Court in this case; however it is regrettable that the Court later dismissed the writ of *certiorari* on the basis of a procedural error.

⁴²² See further Drinan "Article 36 of the Vienna Convention on Consular Rights: Private Enforcement in American Courts after *LaGrand*" (2001-2002) 54 *Stan LR* 1304.

⁴²³ See further Weisburd "International Courts and American Courts" (1999-2000) 21 *Mich J. Int'l L* 877 at 878.

⁴²⁴ *Ibid.*

context, it is covered only to the extent that it brings out the complex relationship between domestic courts and the ICJ.

5.2 WHO SHOULD ENFORCE THE DECISION?

The judgment in *LaGrand* reads as follows:

“...it would be incumbent upon the United States to allow review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.”⁴²⁵

The ruling thus begs the question: which branch of the government should enforce the decision?

5.2.1 The Executive

The United States Constitution confers upon the President the power and the duty to carry out U.S. obligations under international law.⁴²⁶ This clause would tend to suggest that the executive should implement the ICJ decision, since the ICJ decision amounts to an obligation under international law. However, until recently the President remained silent on the issue of the observance of consular rights.⁴²⁷ This response was rather disturbing because the reciprocal nature of the VCCR means systematic non-compliance by the U.S. may create tensions with other states and jeopardise the position of U.S. citizens abroad. However, on 28 February 2005, the President issued a memorandum order directing state courts to give effect to the ICJ’s

⁴²⁵ *LaGrand (Germany v United States)* (Judgment of 27 June 2001) hereinafter referred to as *LaGrand* judgment. Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>. on 28 January 2006.

⁴²⁶ Article II, section 3 of the Constitution of the United States of America (hereafter referred to as the U.S. Constitution).

⁴²⁷ Paulus “From Neglect to Defiance? The United States and International Adjudication” (2004) 15 No 4 *EJIL* at 798.

decision in *Avena*.⁴²⁸ The directive seems to blur the line between the President's executive power and the power of the courts to apply law. The president's directive could thus be construed as an interference with the judiciary and therefore a violation of the doctrine of separation of powers. Consequently, the validity of his action is potentially questionable. A positive element, however, is that in directing State Courts to adhere to the ICJ decision, the President was making a statement of what should be; in essence that U.S. State Courts should adhere and defer to the ICJ in the case at hand. However, this directive might not have the desired effect, because its legality remains uncertain.

This was not the first effort of its kind from a member of the executive. The United States argued in *LaGrand* that several executive initiatives were underway, for example, a federal programme to enhance the awareness of the requirement to inform foreign detainees about their consular information.⁴²⁹ Such means did not achieve compliance by state officials, so that even where the executive did speak out, this was not met positively. For example, the United States Secretary of State, Madeleine Albright, wrote a letter dated 13 April 1998 to the governor of Virginia⁴³⁰ in which she requested a stay of Angel Breard's execution. Governor Jim Gilmore responded as follows:

“...the International Court of Justice has no authority 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.”⁴³¹

⁴²⁸ Weisburd “International Judicial decisions, Domestic Courts and the Foreign Affairs Power” (2004-2005) *Cato Supreme Court Review* 287 at 307.

⁴²⁹ This was recognised in *LaGrand judgments supra* at para 123-124.

⁴³⁰ See Aceves “International Decisions: Application of the Vienna Convention on Consular Relations (*Paraguay v United States*) and *Breard v Greene*” (1998) 92 *Am. J. Int'l L.* 517 at 520.

⁴³¹ Cited in Charney and Reisman “The facts” (1998) 92 *Am J. Int'l L.* 673-674.

This is a problem of federalism and it is clear that there is nothing that binds the state governor to act in conformity with the Secretary of State's recommendation. A similar opinion is found in a statement made by the Solicitor General, who is the legal representative of the executive branch before the Supreme Court, in which he argued that the ICJ does not exercise any judicial power over the United States; which is vested exclusively by the constitution in the United States federal Courts.⁴³² The dualist idea of international law and national law can clearly be seen in these two opinions. The underlying presumption in these comments is that international law and national law are two separate systems. As a result, an international institution cannot direct the affairs of a state since it would be overstepping the international/domestic boundary line.

There has thus been very little positive response from the executive. At best, the U.S. State Department was recorded as saying the following: "...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."⁴³³

According to Andreas Paulus, this can be understood as the U.S. State Department's effort to avoid open defiance and rather seek compliance through persuasive rather than legal means.⁴³⁴ No politically risky moves have been made by the executive, such as an appeal to the court to implement the decision or a recommendation to conform U.S. laws to the *LaGrand* decision. It is worth noting that the executive has shown a stronger stance in matters dealing with trade law. For example, when the European Union imposed sanctions against the U.S. for failing to adapt its privileges for Foreign Sales Corporations to the WTO Appellate Body, the executive urged congress to implement the ruling.⁴³⁵ It would thus seem that the United States is more

⁴³² *U.S. v Ortiz*, 315 F.3d 873, cert denied, 124 S.Ct.920 (2003).

⁴³³ Comment by Philip T. Reeker (Deputy Spokesperson). See Daily Press briefing, Washington DC, 13 August 2002 at 10. Accessed at <http://www.state.gov/r/pa/prs/dpb/2002/12644.htm>. on 30 January 2006).

⁴³⁴ Paulus 2004 *EJIL* 799.

⁴³⁵ Statement by Scott McClellan on European Union Tariffs (Press Briefing of 1 March 2004). Accessed at <http://www.whitehouse.gov/news/releases/2004/03/20040301-4.html#3> on 19 October 2005.

willing to take bolder steps in matters of trade law, where there is a likelihood of economic gain, than in matters concerning human rights. On this basis, it is unlikely that any concerted action will be forthcoming from the executive to implement the ICJ decision. The federal system in the United States will allow the executive to pass requests along to different departments *ad infinitum*, with no resolution being attained. While executive statement and action would certainly help to ease the tension of the situation brought about by *LaGrand*, any such response from the executive will come as a surprise.

5.2.2 The Legislature

It is equally uncertain that change will come through the legislative branch of government. Traditionally, the executive is the branch of government most concerned with the implementation of foreign law decisions. Contemporary international legal rules now penetrate into the domestic. Consequently, even the legislature has come into more contact with international laws and, with that, increased pressure to legislate in accordance with prevailing international norms.

Historically, the U.S. Legislature has been the least amenable to international pressures. In the 1950s, Congress considered an amendment to article II section 2 of the U.S. Constitution which gave the President the power to make treaties with foreign states. The amendment, known as the Bricker amendment, sought to limit this power by mandating that treaties could become effective as internal law in the U.S. only through legislation.⁴³⁶ This proposal was fuelled by fears that treaties would supersede the constitution, since the supremacy clause in the Constitution provides that treaties shall be the supreme law of the land, notwithstanding anything to the contrary in the Constitution.⁴³⁷ This record of minimising the internal effect of treaties

⁴³⁶ See Justin Raimondo 'The Bricker Amendment'. Accessed at <http://www.antiwar.com/essays/bricker.html> on 5 February 2006).

⁴³⁷ Article 6 Clause 2 of the U.S. Constitution reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

has continued. For instance, since the withdrawal of U.S. acceptance of the Optional Clause, the Senate has not given its advice and consent to treaties providing for the binding interpretation of the I.C.J without some form of reservation.⁴³⁸ Additionally, it was the Congress that openly supported the administration by allotting funds to the Contras (rebels) in the *Nicaragua* case two days before the ICJ came to a decision on the matter. Thus Paulus⁴³⁹ says; “[A]t 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.”

Even after *LaGrand* little was done to amend the Anti-terrorism and Effective Death penalty Act of 1996, which legislated the doctrine of procedural default. Legislative amendments do require time, but since 2001, there has been no evidence of any intention to do so. The hostility towards international judicial institutions is even more apparent through a move by 50 members of Congress to introduce a resolution asking courts to cease to refer to foreign adjudicatory bodies.⁴⁴⁰ This hostile attitude towards international law is likely to persist. As a consequence, the legislature, although a means to implement the ICJ decision, is unlikely to be the medium through which change comes.

5.2.3 The Judiciary

It is not solely the willingness of the courts to implement ICJ decisions that warrants discussion, but also the ability of the courts to do so. The latter will be discussed in this section, whereas the former is the subject of the next chapter.

As already mentioned in this thesis, the lack of enforcement in international law has been regarded as one of the main hurdles to its effectiveness. But the possibility of enforcement of ICJ decisions being deferred to national courts has not received much attention until recently. Chapter 3 of this thesis showed that the drafters of Article 94

⁴³⁸ Paulus 2004 *EJIL* at 800.

⁴³⁹ *Ibid.*

⁴⁴⁰ Draft H. Res. 568, 108th Congress, 2d Session, 17 March 2004. Accessed at <http://www.house.gov/feeney/downloads/reaffres.pdf> on 31 January 2006).

of the United Nations Charter used imprecise language, giving the Security Council wide discretion in matters of enforcement. The section does not however mention the role of domestic judiciaries in enforcing the ICJ decisions. This is significant, since it could indicate an intention that the Security Council be the sole enforcement mechanism of the ICJ.⁴⁴¹ If there were an absolute discretion on domestic judiciaries to enforce ICJ decisions, the wide discretion conferred on the Security Council would certainly be compromised. It would thus appear that in terms of the Charter, enforcement of ICJ decisions is left solely to the Security Council and no absolute requirement rests on domestic courts to enforce a decision. The question is: what would be the result if the ICJ in its ruling makes a directive that requires a response from the domestic government?

LaGrand required ‘review and reconsideration’ of the sentence and conviction by means of United State’s own choosing, but the United States argued in *Avena*⁴⁴² that clemency was an effective method of review and reconsideration, since in many cases it results in “pardons of convictions and commutations of sentences”. Furthermore, executive clemency was considered appropriate because it involved the broad participation of clemency advocates who are not bound by the broad principles of prejudice and procedural default.⁴⁴³ Mexico disputed this claim, arguing that the United States interpretation of ‘review and reconsideration’ was not correct, in that executive clemency is not what was envisaged by the court in *LaGrand* and is wholly inappropriate because it is “standard-less, secretive, and immune from judicial oversight.”⁴⁴⁴ The *Avena* court observed that the decision in *LaGrand* proceeded on the premise that ‘review and reconsideration’ should occur within the overall judicial proceedings.⁴⁴⁵ The court in *Avena* thus reasoned that effective review and reconsideration “should take account of the violation of the rights set forth in the

⁴⁴¹ Tanzi “Problems of the Enforcement of Decisions of the International Court of Justice and the Law of the United Nations” (1995) *EJIL* 3.

⁴⁴² *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment of 31 March 2004) [hereinafter referred to as *Avena Judgment*] at para 143. Accessed from <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> on 10 February 2006.

⁴⁴³ *Avena* judgment *supra* at para 137.

⁴⁴⁴ *Avena* judgment *supra* at para 135.

⁴⁴⁵ *Avena* judgment *supra* at para 141.

Convention ... and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account...”⁴⁴⁶ The court found that the forum best suited to ensure this was the judiciary.⁴⁴⁷ In effect the Court was specifying that effective implementation of the *LaGrand* decision must be done by the U.S. judiciary and not left to the executive.

It would thus seem that although it was not expressly said in the *LaGrand* judgment that the American judicial system should implement the decision, it is embedded in the judgment that change to VCCR cases must take place in the context of the judiciary.⁴⁴⁸ It would not therefore be presumptuous to say that *LaGrand* amounted to a case where the ICJ issued a directive, albeit implicitly, to the U.S. national courts to change their approach to VCCR cases by disregarding certain domestic rules when their application would result in the violation of rights contained in the convention. The following questions must then be asked: does international law mandate that national courts should be active enforcers ICJ decisions, and do national courts have the authority to do so in terms of U.S. law?

5.3 ENFORCEMENT BY THE U.S. NATIONAL COURTS

The relationship between the ICJ and domestic courts is unlike any other court relations. It is unlike the relationship between a domestic court and a foreign court and very unlike the relationship between a superior court and a lower court in a domestic system. It is for this reason that Weisburd⁴⁴⁹ argues against the idea that domestic courts should enforce international judicial decisions of the ICJ. He points out that cases before the ICJ often involve issues of great political complexity because only countries can be party to a case before the ICJ. To suggest that a domestic court should enforce a decision of the ICJ would be both awkward and unfair since it would

⁴⁴⁶ *Avena* judgment *supra* at para 138.

⁴⁴⁷ *Avena* judgment *supra* at para 140.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Weisburd “International Courts and American Courts”(1999-2000) 21 *Mich. J. Int’l L.* 877 at 890.

amount to burdening a court with a duty it is neither intended to address nor geared to resolve.⁴⁵⁰

One factor raised against national enforcement of ICJ decisions by courts is the fear that it would appear that the ICJ is functionally superior to U.S. domestic courts. However, international law does not trump national law simply because it is international. Weisburd⁴⁵¹ warns that such a belief is misplaced because international tribunals and courts are mechanisms of government and their utility is no more self-evident than that of any other governmental institution. Thus they should not be seen as neutral institutions, detached from the political endeavours of the day. Consequently, Weisburd finds that there is a lack of evidence to support the direct enforcement of ICJ decisions by domestic courts. He reinforces his argument by showing that the general approach to enforcement in international law is that where execution by domestic courts is mandated, the treaties indicate this expressly.⁴⁵² He shows further that article 17 of the General Act on Pacific Settlement of International Disputes⁴⁵³ (General Act) and its successor the Revised General Act for the Pacific Settlement of Disputes (Revised Act)⁴⁵⁴ provide the following article:

“If, in a judicial sentence or arbitral award, it is declared that a judgment, or a measure enjoined by a court of law or other authority of one of the parties to the dispute, is wholly or in part contrary to international law, and if the constitutional law of that party does not permit or only partially permits the consequences of the judgment or measure in question to be annulled, the parties agree that the judicial sentence or arbitral award shall grant the injured party equitable satisfaction.”⁴⁵⁵

⁴⁵⁰ *Ibid.*

⁴⁵¹ Weisburd 1999-2000 *Mich. J. Int'l. L.* at 935.

⁴⁵² Weisburd 2005 *Cato Supreme Court Review* 302.

⁴⁵³ 26 September 1928 (an act that required parties to arbitrate or submit their disputes to the PCIJ).

⁴⁵⁴ 28 April 1949 (an act that requires parties to arbitrate or submit disputes to the ICJ).

⁴⁵⁵ General Act *supra* art. 32, Revised General Act *supra* art. 32.

This section makes provision for the possibility that domestic law may preclude enforcement of international decisions by national courts. Weisburd thus argues that the language in this section only makes sense if it is assumed that the drafters did not intend ICJ decisions to have domestic legal effects,⁴⁵⁶ and therefore there is no need for enforcement by municipal courts. He also adds that his finding is in keeping with the enforcement of proceedings of other international tribunals such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁵⁷ which provides that the judgments of the European Convention are only directly enforceable in signatory nations where domestic law provides for such enforcement.⁴⁵⁸ The Iran-United States Claims Tribunal has made statements to the same effect.⁴⁵⁹ He thus shows that where there is intended to be enforcement by domestic courts, the general approach is to do so expressly.

The centre of Weisburd's argument is the fact that neither the ICJ Statute nor the UN Charter mentions enforcement by domestic courts. It is simply left to the Security Council. He thus concludes that this indicates an intention by the drafters that national courts will not be active enforcers of ICJ decisions. The problem with this argument is that it alleges that the absence of one thing denotes the presence of another. This is not automatically so. The fact that the ICJ Statute and the UN Charter are silent on enforcement by domestic courts is not necessarily indicative of the drafter's intention that there is no enforcement by domestic courts. There might be other reasons for the silence. Firstly, the Statute was drawn up during the early stages of international law, and it is possible that the drafters considered the Security Council to be the best enforcer of international law because of the political nature of the cases, which render enforcement by domestic courts more complex. As international law has developed however, it has become apparent that the Security Council is not always the most suitable body to deal with a matter.⁴⁶⁰ This leads to the second point, that the silence

⁴⁵⁶ Weisburd 1999-2000 *Mich. J. Int'l L.* at 884.

⁴⁵⁷ 4 November 1950.

⁴⁵⁸ Weisburd 1999-2000 *Mich. J. Int'l L.* at 888.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ See Chapter 3 discussion on enforcement.

in the ICJ Statute and the UN Charter could be explained away by the fact that the drafters did not intend ICJ decisions to have domestic legal effects.⁴⁶¹ Weisburd acknowledges this fact, and *Breard*, *LaGrand* and *Avena* are clear demonstrations that ICJ decisions can have domestic legal effects (albeit rarely). Consequently, his argument is unsatisfactory.

In any event, the facts in the trilogy warrant a discussion of the possibility of domestic enforcement of ICJ decisions. The issue is a relatively new one, and as a result, very little case law sheds light on the question. One noteworthy case is that of *Socobel v The Greek State*.⁴⁶² In this case, a Belgian corporation sought to enforce, in the Belgian Courts, a judgment against Greece, delivered by the PCIJ twelve years earlier. In this case the PCIJ had found certain arbitrations between the corporation and Greece to be valid. The domestic court, however, rejected the case on the basis that a decision of the PCIJ could not have direct domestic effect with respect to a matter litigated before the PCIJ. The court thus held that the international decision was equivalent to a foreign judgment, that is, the PCIJ decision was not one of a superior tribunal, and consequently it had only persuasive value.

In *Administration des Habous v Deal*⁴⁶³ a French lower court in Morocco had found it did not have jurisdiction to hear a matter involving the eviction of an American national. This decision was reversed in a higher court, by the Appeal Court of Rabat, relying on a decision of the PCIJ in the *Rights of Nationals of the United States of America in Morocco (Fr v U.S)*⁴⁶⁴ where the ICJ had held that Americans were not exempt from the jurisdiction of French Courts in Morocco. This is the only court where a domestic court enforced a decision of the international court directly, thereby treating it as precedent.⁴⁶⁵

⁴⁶¹ This is in terms of art. 2(7) of the UN Charter.

⁴⁶² 18 I.L.R. 3 Belg. Trib. Civ. de Bruxelles (1951).

⁴⁶³ 19 I.L.R. 342 (Morocco, Ct. App. Rabat 1952).

⁴⁶⁴ 1952 I.C.J. 175 (Aug 27).

⁴⁶⁵ It must be noted that the decision has met with some criticism (see Weisburd 2005 *Cato Supreme Court Review* at 304).

The above references do not, however, sufficiently address the unique situation created by *LaGrand*. It is clear that the order was directed to the United States and therefore required some response. Some argue for the increased involvement of the judiciary in resolving the problem. Ray⁴⁶⁶ suggests that the only body that can settle the issue and enforce the ICJ decision is the U.S. Supreme Court. This is simply because it has the means to resolve it and the authority to implement the decision.⁴⁶⁷ She argues that the *Paquete Habana*⁴⁶⁸ case declares that international law is incorporated into domestic law and must be enforced by the domestic courts. The question is whether international decisions qualify as ‘international law’ in this sense. It has been said that the ICJ’s role is not to declare law but interpret it.⁴⁶⁹ If this is the case, then its decisions cannot simply be accepted as law. However, the case at hand deals with a treaty that is the subject of interpretation. Secondly as signatory to the United Nations Charter, the U.S. accepts the decisions of the court as binding under Article 94. It then follows that the U.S. is, as a matter of international law, bound to the interpretation of the Court. This means they must now enforce the decision. This might be an oversimplification, but the only reason that the United States should be excused from implementing the ICJ decision is if it will result in some unconstitutional end. This is problematic. United States law distinguishes between treaties that can be applied by the courts without legislative intervention (self-executing) and those that require legislative enactment before they can be applied by domestic courts (non-self-executing).⁴⁷⁰ As the Vienna Convention is a self-executing

⁴⁶⁶ Ray “Domesticating International Obligations: How to ensure U.S. Compliance with the Vienna Convention on Consular Relations” (2003) 91 *Cal. L. Rev.* 1729 at 1766.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ 175 U.S. 677, 700 (1900). In this case the Supreme Court declared: “[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”

⁴⁶⁹ Sellers “The Authority of the International Court of Justice” (2002) 8 *Int’l Legal Theory* 41 at 46.

⁴⁷⁰ The courts have established that despite its status under the Supremacy Clause, a treaty does not generally create private rights that are enforceable in the courts. However, a treaty will create individually enforceable rights if it is deemed to be self-executing. For a further discussion on this, see Schiffman “Breard and Beyond: The Status Of Consular Notification And Access Under the Vienna Convention” (2000) 8 *Cardozo J. Int’l & Comp. L.* 27 at 34-37.

treaty, there is no need for enabling legislation before the Courts can accept this⁴⁷¹ and further, individuals should have standing to enforce the rights in the VCCR.

The question remains, what if this produces an unconstitutional end? Article VI clause 2 of the U.S. Constitution places the Constitution, U.S. laws and treaties on a par, notwithstanding anything to the contrary in the Constitution. This means as a treaty, the VCCR should be applied in spite of anything in the constitution, and furthermore, such application by the courts is lawful since it is a self-executing treaty. Thus, Ray⁴⁷² concludes that the matter can be enforced very easily by a Supreme Court ruling in accordance with *LaGrand* and such ruling would not be unconstitutional. From this, it would seem that it would not be unconstitutional to require the courts to enforce the ICJ decision. This conclusion seems to be more in keeping with the finding of the court in *Avena*,⁴⁷³ but it does not account for other difficulties. While it is acknowledged that the Supreme Court is well positioned to settle the situation, at least in respect of the lower courts, the Supreme Court still has to grapple with difficulties such as the separation of powers and the political question doctrine.⁴⁷⁴ Consequently, Ray's position cannot be accepted as a conclusive solution to the issue.

The problem with the above is that it appears to place the ICJ in some position of authority over the U.S. domestic courts. In one sense this is exactly as it appears.

⁴⁷¹ Ray 2003 *Cal. L. Rev* 1767. After much controversy this was settled in the case of *Standt v United States*, 153 F. Supp. 2d 417 at 423 (S.D.N.Y. 2001) for a discussion on the self-executing nature of the VCCR.

⁴⁷² Ray (*ibid*).

⁴⁷³ However, courts have not accorded treaty rights the same respect as constitutional rights (Luna & Sylvester (1999) 17 *Berkeley J. Int'l L.* 147 at 153). It has been said, "Although States may have an obligation under the Supremacy Clause to comply with provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty violations ... into violations of constitutional rights" (*Murphy v. Netherland*, 116 F.3d at 100). Similarly, see the decision of the Southern District of New York in which it was said: "A convention or treaty signed by the United States does not alter or add to our Constitution. Such international agreements are important and are entitled to enforcement, as written, but they are not the bedrock and foundation of our essential liberties' (Alvarado-Torres, 45 F. Supp. 2d at 994). But in the case of *Banco Nacional de Cuba v Sabbatino* (376 U.S. 398 at 428 (1964)), the Supreme Court held that "the greater the degree of codification or consensus concerning a particular area of the international law, the more appropriate it is for the judiciary to render a decision regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact". It has certainly been shown that there is much need for consensus in the area of VCCR rights, not only because the courts have displayed remarkable disunity in this area, but also because of the frequency of applications before the ICJ and the high number of immigrants residing in the United States.

⁴⁷⁴ These doctrines are discussed further later in the chapter.

After all, the U.S. submits to the ICJ's jurisdiction, therefore running the risk of an adverse judgment. Yet in another sense it is not so, because while the ICJ has a measure of authority over U.S. courts, it does not give the Court license to be a despot. What makes the ICJ's approach in the *LaGrand* even less despotic is the fact that the court showed respect for domestic laws by leaving the question of an appropriate remedy to the U.S. By the time *Avena* came before the court, it was apparent that the U.S. had misunderstood this discretion and the Court merely clarifies its position. This is hardly the response of a despotic institution. So to require U.S. courts to implement the ICJ decision would not be to subordinate them to the ICJ. Rather, it is simply an international obligation that the United States, and indeed its courts, has incurred.

In sum, there is no clear provision in the various instruments of international law that indicates an absolute obligation on the domestic courts to enforce decisions of the ICJ. At best it can be argued that U. S courts should implement the decision of the ICJ for two reasons; firstly, because the order in *LaGrand* was directed at the judiciary, and secondly, because the Supreme Court of Appeal has the means to resolve the matter speedily and efficiently, although this is not without its difficulties.

5.4 THE RESPONSE OF U.S. COURTS TO THE ICJ DECISIONS

5.4.1 The history of Article 36 in the U.S.

It is important to begin by looking at the history of the problem in the U.S. since it serves as a good indication of future behaviour by the U.S. courts. The history of Article 36 in the United States is not impressive. Cara Drinan⁴⁷⁵ suggests that the courts have often erred in two respects: Firstly, they have treated the rights in Article 36 as belonging to states and not individuals⁴⁷⁶ and secondly, the courts have

⁴⁷⁵ Drinan 2001-2002 *Stan LR* 1305.

⁴⁷⁶ Although some courts have held that Article 36 rights had individual rights status, the matter had not been settled by the US Supreme Court before *LaGrand*. See the case of *Breard v Greene*, 523 U.S. 371 (1998) at 376, where the court said Article 36 arguably creates an individual right.

considered the violations to be best remedied by political organs and not the courts.⁴⁷⁷ This meant that the courts have a relatively minor role to play since Article 36 did not disrupt the criminal justice process. But now the ICJ's findings in respect of the procedural default rule and the nature of Article 36 rights requires a shift by the American courts. It is worth noting that this work does not deal with the U.S. courts' responses to the ICJ provisional measures orders. The legality of their responses to the provisional orders or lack thereof is the subject of other papers and will not be included in the scope of this one. Rather, this work will look at the response of the courts after the final order was made, with the aim of securing the way forward for future litigants.

VCCR claims on the basis of Article 36 violations began in the mid-1990s. The U.S. Courts had acknowledged the purpose and importance of these rights, but were unresolved on the nature of rights envisaged by Article 36.⁴⁷⁸ Does the article give rise to individually enforceable rights? And if it does, what remedy would be appropriate for these violations? Though treaties are contracts between sovereigns and thus generally enforced by government action, the United States has accepted that self-executing treaties are of a different nature and can be enforced by the courts.⁴⁷⁹ The problem is that there has been a lack of consensus on the application of this rule. Some courts⁴⁸⁰ have found that Article 36 rights are not individually enforceable, while other courts⁴⁸¹ have held to the contrary. Even for those courts that did find that Article 36 rights had the character of privately enforceable rights, there was still the hurdle of a remedy. Most U.S. courts held that in order to have a remedy, a litigant

⁴⁷⁷ See for example, *United States v Li* 206 F.3d 56 63-64 (1st Circ. 2000) where it was said 'the remedies for failures of consular notification under the VCCR are diplomatic, political or exist between states under international law.

⁴⁷⁸ Ray 2003 *Cal. L. Rev* 1737.

⁴⁷⁹ *Head Money* cases, 112 U.S. 580, 598-99 (1884), where it was said, "[A] treaty may also contain provisions which confer certain rights upon citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."

⁴⁸⁰ *Kasi v Commonwealth*, 508 S.E.2d 57, 64 (Va. 1998).

⁴⁸¹ *United States v Lombera-Camorlinga* 170 F.3.d 1241 (9th Circ, 1999).

would have to prove prejudice,⁴⁸² but the ICJ dismissed this as immaterial.⁴⁸³ No ruling has to date been made by the Supreme Court on the matter. Now the ICJ has ruled in *LaGrand* that Article 36 rights have the status of individual rights and still other international bodies have found the same. For example, the Inter-American Court of Human Rights found, after a comprehensive study of Article 36, that it contained rights analogous to the individually enforceable rights contained in article 14 of the International Covenant on Civil and Political Rights.⁴⁸⁴

5.4.2 Article 36 jurisprudence in the U.S. after *LaGrand*

The ICJ ruling in *LaGrand* was thus bound to be significant, since it touched on matters previously unsettled. But it remains unclear which branch of the United States government should respond. It is understood from the judgment that the intention was not to use the Security Council to enforce the decisions in this particular case. In any case, *LaGrand* is unique because it deals with matters so quintessentially domestic that only internal measures, or measures initiated by the United States itself, could effectively enforce this.

The response of the United States judiciary to the *LaGrand* decision was far from impressive. The United States judiciary displayed a notable failure by not referring to *LaGrand* at all and those that did, did so inadequately. After *LaGrand*, between July 2001 and March 2002 eight decisions involving consular rights violations appeared before the courts. In these eight cases, only one even made reference to *LaGrand*.⁴⁸⁵

⁴⁸² In essence, the litigant must show that he position has been prejudiced as a result of the lack of consular access (Ray 2003 *Cal. L. Rev* 1740).

⁴⁸³ See *LaGrand* judgment *supra* at para 74. Accessed at <http://www.icj-cij.org/ijcwww/idocket/igus/igusframe.htm> on 30 January 2006.

⁴⁸⁴ See "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law." Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. ser. A. 16 (1999). Accessed at http://www.corteidh.or.cr/seriea_ing/index.html on 12 February 2006.

⁴⁸⁵ *U.S. v Dixon* No 01-4298, 2002, U.S. App Lexis 2402 (4th Circ Feb 3 2002), *U.S. v Cowo*, No. 00-1499, 2001 U.S. App. LEXIS 24963 (1st Circ. Nov. 20, 2001), *U.S. v Canilo and Soto* 269 F.3d 761 (7th Circ. 2001), *U.S. v Minjares-Alvarez*, 264 F.3d 980 (10th Circ. 2001), *U.S. v Dwyer* No. 99-2483, 2001 U.S. App. Lexis 16142 (6th Circ. July 16, 2001), *U.S. v Emuegbunam* 268 F. 3d 377 (6th Circ. 2001), *U.S. Felix-Felix* 275 F.3d 627 (7th Circ 2001) *U.S. v Bustos de la Pava* 268 F. 3d 157 (2nd Circ. 2001).

In the *Alvarez*⁴⁸⁶ case, *LaGrand* was mentioned, but the court rejected the relevance of *LaGrand* on the basis that the ICJ did not consider the exclusionary rule to violations of Vienna Convention. Thus, the only court that did mention *LaGrand* did so unsatisfactorily; furthermore the same court only one month after *LaGrand* is recorded as having said: “[I]t remains an open question whether the VCCR gives rise to any individually enforceable rights.”⁴⁸⁷

There is one exception to this general trend. In the case of *United States ex rel. Madej v Schoming*,⁴⁸⁸ a district court found that a state should not use the procedural default rule as a basis for denying relief in cases of Article 36 violations. As to the nature of the rights, the court uttered its view that the ICJ decision on the status of Article 36 rights was authoritative. The court said:

“[T]he interpretations of the Vienna Convention by the International Court of Justice (I.C.J.) are binding as to the terms of the treaty. To disregard one of the ICJ’s most significant decisions interpreting the Vienna Convention would be a decidedly imprudent course. [A]fter *LaGrand*...no court can credibly hold that the Vienna Convention does not create individually enforceable rights.”⁴⁸⁹

Although a positive step, it is unlikely that this decision will bring change to federal jurisprudence. The *Valdez*⁴⁹⁰ case was an even more positive response to *LaGrand*. In this 2002 case the court granted relief to a Mexican national on death row, although on a separate legal basis. The Court was unable to stand on the ICJ’s reasoning in *LaGrand* and it concluded that despite its own opinion, it was bound by the ruling in *Breard*, until a Superior Court changes the ruling.⁴⁹¹ One is tempted to criticise this finding on the basis that the court found a convenient way to avoid the problem.

⁴⁸⁶ *Supra* at 987.

⁴⁸⁷ *Supra* at 986.

⁴⁸⁸ 223 F. Supp. 2d 978-79 (N.D. 111, 2002).

⁴⁸⁹ *Supra* at 1.

⁴⁹⁰ *Valdez v State*, 46 P. 3d 703 (2002).

⁴⁹¹ *Supra* at 709.

However, the Court's reasoning is a perfectly acceptable take on the matter. The bottom line is that until a matter has been settled by a superior court, the lower courts are unable to disregard the decisions of these higher courts.

Drinan⁴⁹² argues that U.S. courts have operated from an ideological standpoint that opposes the role of the ICJ in national law. The fear that *LaGrand* will have any practical impact on national law is simply an out working of this ideology. She then raises the interesting point that the lack of acknowledgement of *LaGrand* in the U.S. is also the result of the perception that the drafters of the VCCR in 1963 did not intend it to alter the domestic criminal procedure in the dramatic way that *LaGrand* does.⁴⁹³ Another reason is the long-standing tradition of deferring matters that implicate policy to the political branches of the government. (This subject is expanded upon later in the chapter under the heading 'Political question doctrine'.) Finally, Drinan⁴⁹⁴ also points out that courts at domestic levels are ill-informed on international law matters, so they might seek to avoid mentioning the ICJ for fear that they will be unable to resolve the matter correctly, and thereby draw attention to themselves through appellate review. While it is acceptable that the above-mentioned reasons form contributing factors, it is most probable that the predominantly negative response by the U.S. courts is because they were simply applying U.S. precedent handed down in *Breard v Greene*.⁴⁹⁵ So in one sense, the poor response can be appreciated. Until recently, the legislature and the executive had been silent on the issue, and these two branches seemed to be the most obvious avenues for change. Yet at the same time, the courts, being independent bodies, should also be unafraid to entertain such cases in order to bring change where it is necessary. The fact that this did not happen is indicative of the unreality of international law in the United States.⁴⁹⁶

⁴⁹² Drinan 2001-2002 *Stan LR* at 1310.

⁴⁹³ Drinan 2001-2002 *Stan LR* at 1311. Also see *Li Case supra* at 65-66.

⁴⁹⁴ Drinan 2001-2002 *Stan LR* at 1312.

⁴⁹⁵ *Supra*.

⁴⁹⁶ See Fitzpatrick "The Unreality of International law in the United States and the *LaGrand* case" (2002) 27 *Yale J. Int'l L.* 427.

5.4.3 The prevalence of international law in the domestic sphere

The issues in *LaGrand*, although complex, implicate treaty obligations; which domestic court judges should not be unfamiliar with. Babcock⁴⁹⁷, writing in 2002, states that in terms of international law the U.S. is undergoing a paradigm shift. Previously, few lawyers understood the relevance of international law to an accused undergoing domestic legal proceedings. This is attributed to the fact that few law schools had international law as a required subject.⁴⁹⁸ However, this has changed. International law issues are litigated in the courts with greater frequency, meaning national courts and judges need to be informed on the international legal norms. It has been put as follows:

‘Globalization has now so pervaded our national culture and identities that a court that consistently ignored international precedents and experiences when considering human rights issues, even if merely for their persuasive or moral weight, risks irrelevancy.’⁴⁹⁹

It is this aspect that makes *LaGrand* of particular interest. *LaGrand* is an intricate weaving of rights and obligations on the international and national level. These rights and obligations intertwine in such a way that they clearly show the interdependence of international law and domestic law; more specifically, how international legal principles have now permeated the domestic sphere. The response of the U.S. courts after *LaGrand* was far from impressive. But apart from criticising the courts for their ignorance of contemporary legal decisions, the case also highlights a further matter of interest, and that is the problem of how courts can relate to the ICJ while remaining within the boundaries of the judiciary. There are numerous hurdles that courts face in applying international decision such as *LaGrand* that must be factored.

⁴⁹⁷ Babcock “The Role of International law in U.S. Death Penalty Cases” (2002) 15 *LJIL* 367-387.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Davis “Lecture: International Human Rights and United States Law: Predictions of a Court Watcher” (2000) 64 *Alb. L. Rev* 417.

5.5 BARRIERS TO ENFORCEMENT

5.5.1 Separation of Powers

One of the major barriers to an increased role for national courts in the international sphere is rooted in the doctrine of separation of powers. This doctrine requires the functions of government to be classified as legislative, executive or judicial, and requires each branch to perform separate functions.⁵⁰⁰ This then creates a system of shared power called checks and balances.⁵⁰¹ The rationale behind this system is to avoid a concentration of power in a single person or body.

Separation of powers is a modern feature of contemporary democratic constitutions. It is often implicit in constitutions.⁵⁰² For instance, the application of the separation of powers doctrine in the U.S. can be inferred from the division of the government into three branches, the Legislature,⁵⁰³ the Executive⁵⁰⁴ and the Judiciary.⁵⁰⁵ So the Constitution sets out very specifically what each branch is permitted to do. This doctrine can form a barrier to national courts' enforcement of international decisions, because international law regulations often deal with the relations between states; many of which are a question of foreign policy. Therefore, strictly speaking, this is the domain of the Executive. This then limits the role that a court can play.

Suppose the U.S. Courts did directly enforce the ICJ decision in *LaGrand*: would they be infringing upon the domain of the executive? It is possible to argue that the real obligation is incurred on the international level, when the U.S. through its executive

⁵⁰⁰ Currie & De Waal *The Bill of Rights Handbook* 5th ed (2005) 18.

⁵⁰¹ Mahler 'Constitutional Topic: Separation of Powers'. Accessed at http://www.usconstitution.net/consttop_sepp.html on 8 February 2006.

⁵⁰² See also the South African decision in *South African Association of Personal Injury Lawyers v Heath* 2001(1) SA 883 (CC) at para 21, where the judge shows that this is a feature of the United States, Australian and South African Constitutions.

⁵⁰³ The Legislature is composed of the House of Representatives and the Senate. See Article I of the U.S. Constitution. Available at <http://www.usconstitution.net/const.html>. (Accessed on 8 February 2006).

⁵⁰⁴ See article II of the U.S. Constitution (*ibid*).

⁵⁰⁵ See Article III of the U.S. Constitution (*ibid*).

arm, became a signatory to the VCCR and submitted to the jurisdiction of the ICJ. The incurring of the obligation and the implementation thereof are two separate matters. Whether the national courts implement the decision in *LaGrand* or not, they are not the avenue through which the obligation was incurred. It is merely a question of enforcement at this stage. So although the idea of national courts acting as direct enforcers of ICJ decisions at first glance appears to breach the separation of powers, this is not the case.

5.5.2 The political question doctrine

It has been mentioned that the doctrine of separation of powers requires separate functions for each branch of the government. The doctrine of political question is an extension of this principle.

The political question doctrine is a rule that issues of political nature, especially foreign affairs, require separate treatment and should be immune from judicial scrutiny.⁵⁰⁶ It states that laws of a political nature ought to be enforced by another branch, the Executive.⁵⁰⁷ So for instance, United States courts have refused to deal with questions of recognition, territorial sovereignty and the international legality of hostilities.⁵⁰⁸ These issues are deemed non-justiciable because of their political character. The issue frequently comes up in international law because of the inherent political nature of the field. Previously this did not pose a problem because international rules were rarely enforced on the domestic plane. Now the position has shifted as international legal principles permeate the domestic legal systems, particularly through the human rights instruments. So now these highly political relations can implicate the rights of individuals, who will in some cases only have an action at the domestic level. This was the turn of events in the trilogy of cases that are the subject of this thesis.

⁵⁰⁶Djajic "The effect of international Court of Justice decisions on Municipal Courts in the United States: *Breard v Greene*" (1999-2000) 23 *Hastings Int'l. & Comp. L. Rev.* at 65.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

The consequence of determining that an issue is of a political nature is to deny a judicial remedy in the face of a violation. This is the manner in which the U.S. courts dealt with the trilogy. Djajic⁵⁰⁹ criticises this and suggests that the U.S. courts' initial response to *Breard* may have prevented international suit had the courts not tried to make a justiciable issue non-justiciable. She argues further that a case is not necessarily non-justiciable because state and individual interests are at stake.⁵¹⁰ As it was said in the famous case of *Baker v Carr*⁵¹¹, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognisance".

This is an important consideration, because the doctrine of political question is not intended to be used as an escape mechanism. Without a clear definition on what is 'political', such abuse may ensue. According to Nafziger⁵¹², the political question doctrine routinely embarrasses the constitutional system. He states that although in theory the doctrine relies on principles of democracy to allow courts to shun rulings on international issues that might complicate foreign relations, in practice, this justification is simply a technique of judicial management. He states the doctrine is the governments' weapon to weed out the controversial cases.⁵¹³

While this might not always be the case, it is certainly a possible danger. As a result courts need to balance the requirement of enforcing international law with requirements such as the political question doctrine.⁵¹⁴ How this balance is struck

⁵⁰⁹ Djajic 1999-2000 *Hastings Int'l & Comp. L. Rev* 67.

⁵¹⁰ *Ibid.*

⁵¹¹ 369 U.S. 186, 211 (1962).

⁵¹² Nafziger "Political Dispute Resolution by the World Court, with Reference to United States Courts" (1997-1998) 26 *Denv. J. Int'l L & Pol'y* 775.

⁵¹³ *Ibid.*

⁵¹⁴ *The Case Concerning United States Diplomatic and Consular Staff in Tehran* at para 35 and 36 (Accessed at http://www.icj-cij.org/icjwww/icasess/iusir/iusir_ijudgment/iusir_ijudgment_19800524.pdf) is an example of an instance when the balance was struck. In the case, Iran argued inadmissibility on the basis that the taking of hostages was only one incident in a complex web of political activities. Such matters were therefore not amenable to adjudication. The court rejected this argument, holding that the case showed clear legal issues and the mere fact that legal issues had a political dimension did not render the case unjusticiable (see Francioni "International Law as a Common Language for National Courts" (2001) 36 *Tex. Int'l L. J.* 587 at 590).

depends on the facts and it would be impossible to define the boundaries between political and legal matters. It suffices to say, if a court is faced with a legal issue, such issue should not be deferred to the executive branch merely because it has political implications.

The political implications of *LaGrand* are obvious. The outcome of the case would have had serious effects on the relationship between Germany and the United States. This immediately invited some executive attention. Yet at the same time, the legal issues can be clearly seen. An analysis of the issues raised by Germany in *LaGrand* will show that many of those issues were in fact legal issues: the binding nature of provisional measures, the interpretation of the VCCR and the issue of an appropriate remedy. Such issues are not political in nature and it is only the context in which they were raised that gives them a political edge. So *LaGrand* and indeed *Avena* were thus cases involving essentially legal issues with political implications. If seen in this light, the political question doctrine cannot be raised as a defence by national courts for the lack of implementation of the ICJ's decisions in *LaGrand* and *Avena*.

As a general rule, when discussing the enforcement of international law decisions by domestic courts, one must be cognisant of the political question doctrine, because whether it is accepted or not, this doctrine poses a great barrier to courts getting involved in political or even quasi-political matters, which very often includes matters of foreign policy.

5.5.3 Stare Decisis and Res Judicata

The legal doctrines of *stare decisis* and *res judicata* are also potential obstacles to any thesis that promotes enforcement of international decisions by national courts. These doctrines are a lot less surmountable than the doctrine of political question because they are not merely principles of practice, but deeply formed legal rules.

5.5.3.1 Stare Decisis

“The common law doctrine of *stare decisis* holds courts to principles of law expressed in earlier decisions which must be applied to subsequent cases where the facts are substantially the same.”⁵¹⁵ The rationale behind the principle is to curb excessive judicial discretion and allow for some consistency in the legal jurisprudence. It is thus not only a sound practice, but a deeply ingrained legal tenet in most modern legal systems today.

However, this doctrine does not apply with respect to decisions of the International Court of Justice. Article 59 of the Court’s Statute states that decisions of the Court are binding as between the parties, and only in respect of that particular case. This section would thus seem to indicate that there is no precedential system as between the ICJ and national courts.⁵¹⁶ This position is not peculiar when one considers the make up of international law. There is no international legislature to override the improper decision and the ICJ’s body of jurisprudence, although on the increase, is in no way near as large as that of national courts. This makes any system of precedents difficult, since a court would not have as large a body of precedent to turn to.⁵¹⁷ Additionally, it has been argued that international law must remain an evolving and flexible field, and a system of precedents would shackle the flexibility of the current system.⁵¹⁸

As a direct consequence, this doctrine cannot be relied upon to compel national courts to enforce ICJ decisions. So the very nature of international law does not lend itself to the operation of this doctrine. In this way, the finding in the *Socobel* case demonstrates how national courts might tend to respond.

⁵¹⁵ Reilly & Ordonez “Effect of the Jurisprudence Of the International Court of Justice On national Courts” (1995-1996) 28 *N.Y.U. J. Int’l L. & Pol.* 435 at 445.

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

5.5.3.2 *Res Judicata*

The doctrine of *res judicata* prevents a litigant approaching the courts a second time on the basis of the same cause of action. So it is a doctrine that bars a claim, if that claim has already been heard on the same merits. The logic of this rule is plain, in that it enables courts to adjudicate a matter with finality. Although the issues before the ICJ would not necessarily be the same as the issues founding a claim before a domestic court, the judgment in *LaGrand* alters this position. The problem is if the U.S. courts are compelled to enforce the ICJ's decision in *LaGrand* or *Avena*, it would amount to a directive to reopen a case that in terms of U.S. law is closed.⁵¹⁹ Even if the courts did so, on their own volition, it would still be a breach of the *res judicata* rule. So, on the basis of this legal rule, national courts would not be able to implement the ICJ's decision in *LaGrand* or *Avena*. The requirement to review and reconsider cuts at the heart of the *res judicata* rule by necessitating that the cases be re-opened and re-heard. It thus poses a further difficulty for courts to simply implement the ICJ's decision in *LaGrand* or *Avena*.

These legal rules are difficult hurdles to surmount. It is hard to conceive of a basis upon which they can be disregarded. Internationalists who advocate a greater role of national courts as enforcers of international decisions must take these legal rules in to account. Whatever the opinion that one holds about these doctrines, it is clear that the general rationale in the trilogy is that where there have been prolonged sentences and severe penalties,⁵²⁰ the need to vindicate the rights of the detained individual is so important that it warrants departure from certain law and practice. In a sense, the ICJ was stating that the rights at risk in these cases, namely Article 36 rights of detainees and those on death row, are important enough to warrant departure from these legal rules. This is understandable, since the punishment in question was irreversible.

⁵¹⁹ Weisburd 2004-2005 *Cato Supreme Court Review* 314.

⁵²⁰ See *LaGrand* judgment *supra* at para 125.

5.5.4 Dualism

When a domestic court is dealing with an ICJ decision, the constitution, statutes and customs of the country concerned will play a vital role.⁵²¹ But the degree to which a domestic court will defer to the decisions of the ICJ is dependant on the status of treaties and customary international law in that nation's legal order. Thus for instance if a nation adopts a monist theory, they will accept a decision of the ICJ as if it were coming from their own highest court,⁵²² whereas a dualist approach accepts domestic law as supreme within the domestic system.

The United States courts have showed a dualist approach to the matter of Article 36 violations in that they have consistently refused to apply the ICJ decision, thereby deferring the responsibility to the executive branch of the government. The history of Article 36 claims in the courts referred to above has shown this. This is obviously because of the perceived conflict between the domestic criminal justice rules and the order of the ICJ. The oversight, however, is that the legislative act that is being awaited has already come and gone. Firstly, the executive has assented to be party to the United Nations and is therefore obliged to implement any decisions of the ICJ to which it is party. Secondly, the United Nations has assented to the Vienna Convention on Consular Rights and is thus obliged to ensure that the rights contained therein are effected.

5.5.5 Constitutionality

The overarching problem with all the abovementioned barriers is that it is not certain that a move by U.S. courts to implement the ICJ decision in *LaGrand* would be constitutional. Some of the barriers mentioned above are only implicitly unconstitutional, but there are express clauses of the U.S. Constitution that may prevent the U.S. court acting on the ICJ decision in *LaGrand* and *Avena*.

⁵²¹ Reilly & Ordonez 1995-1996 *N.Y.U. J. Int'l L. & Pol* 449.

⁵²² For further discussion on Monism and Dualist theories, see Chapter 2.

Article III of the U.S. Constitution deals with the judiciary as a branch of government. It provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain.⁵²³ In the case of *Plaut v Spendruff Farm Inc*,⁵²⁴ it was stated that this section should be read with the understanding that a judgment conclusively resolves the case, because the judicial power in question is one to render dispositive judgments. Thus the U.S. courts do not have the authority merely to rule on cases, but also to decide such cases. It is thus inherent in this section of the Constitution that no other person or body has the authority to decide on cases, be it the Executive, Congress or an international tribunal. Suppose it was accepted that national courts are obliged to enforce decisions of the ICJ, the ICJ would be put in the position of an appellate or review court, which would be in direct contravention of Article III of the U.S. Constitution.

Once again, the prospect of an absolute obligation on U.S. national courts to enforce ICJ decisions is doubtful. Even in the face of a directive by the ICJ, the legality and constitutionality of such a move is uncertain.⁵²⁵ One may argue that this can be circumvented because the ICJ left it up to U.S. courts to decide. Thus it would not be the ICJ that is reviewing the case, but the Supreme Court. This would be in conformity with Article III. The reality is, however, that if U.S. courts do not have the option to reject the ICJ's directive to review and reconsider the sentence and conviction, it is really the ICJ that is acting, albeit through the agency of U.S. courts. Yet at the same time, it must be remembered that the events as they occurred in the trilogy are rare in international law.

Another important point that emerges from this dilemma is the need for reconciliation of international obligations with constitutional provisions. After the Second World War, there was a move to include what was then referred to as the law of nations in national constitutions.⁵²⁶ Now, in the post-Cold War era, the world is witnessing yet

⁵²³ Article III, Section 1 of the U.S. Constitution.

⁵²⁴ 514 U.S. 211 (1995).

⁵²⁵ See further Weisburd 1999-2000 *Mich. J. Int'l. L* 900-924.

⁵²⁶ Vereshchetin "New Constitutions and the Old Problem of the Relationship between International Law and National Law" (1996) 7 *EJIL* at 1 in which he shows that after World Wars I and II, far

another such move. The problem that remains is the classic issue of the relationship between international law and domestic law.⁵²⁷

The ability of U.S. national courts to enforce the ICJ decisions in *LaGrand* and *Avena* is thus a thorny issue, in that the courts must first overcome the problem of separation of powers, the political question doctrine and the legal principles that stand in the way of their enforcement. Even if these are to be overcome, there is still the requirement that whatever the national courts do must be constitutional. When dealing with highly charged issues, like those raised in *LaGrand* and *Avena*, it is tempting to simply surmise that the courts were in error because they had not done as the ICJ had directed. This section has shown that the matter is not as simple as that. There are legal and political obstacles that stand in the way of national courts being direct implementers of ICJ decisions.

5.6 CHAPTER CONCLUSION

With the increase of interdependence forced on the world by global economics, international adjudicative bodies will also increase. With this increase there is a growing need to understand how the decisions of these international adjudicative bodies will impact national decisions and how international obligations will be reconciled with national obligations where they conflict. These issues were all implicit in *LaGrand* and *Avena*.

This chapter thus looked at the response of the U.S. government to these cases. It was said that although all three branches of government are able to influence the implementation process, the ICJ decision in *LaGrand* was directed at the courts. The chapter then considered the U.S. consular rights jurisprudence after *LaGrand* and showed that many of the cases did not even reject *LaGrand*, but merely disregarded it. But before one is tempted to pass judgement on the U.S. courts for their failure to implement the decisions, the chapter also showed the difficult position that domestic

reaching provision on the status of international law were introduced in the German and constitution and after World War II, in the Italian and Japanese constitutions.

⁵²⁷ Vereshchetin (*ibid*).

courts find themselves when dealing with *LaGrand*-like cases. Barriers to enforcement were highlighted and such barriers will exist in any democratic and constitutional state.

Some conflicting views were raised with respect to the constitutionality of national courts enforcing ICJ decision. On the one hand, the VCCR is self-executing and therefore privately enforceable; on the other hand, there is the danger of breaching the constitution by treating the ICJ as an appeal court.

The chapter has thus drawn out the complexities of the issues raised by *LaGrand* and *Avena*. Regardless of how willing the ICJ is to issue directives aimed at securing the rights of detainees, the implementation of such directives is equally important. On a moral level, it is easy to conclude that the U.S. courts should implement the ICJ decision, but on a legal level, there are numerous difficulties that courts would encounter in doing so. Having to grapple with all these issues shows that *LaGrand* left as many gaps open as it covered. However, these gaps are welcome, as the case has incited academic debate on the possibility of using national courts to enforce international decisions.

The next chapter of the thesis will consider the merits of judicial comity as a new basis upon which the international law can be developed to allow for judicial cooperation between the ICJ and national courts.

CHAPTER 6

JUDICIAL CO-OPERATION IN INTERNATIONAL LAW

Contents

- 1 *Introduction*
 - 2 *The Example Of The European Union*
 - 3 *Judicial Comity*
 - 4 *Conclusion*
-

6.1 INTRODUCTION

Far from settling matters for U.S. consular rights law, *LaGrand* in fact left many other matters open. These were addressed in the previous chapters. A principal concern for most academics and practitioners is the impact of the ICJ ruling in *LaGrand* on municipal law and practice. The ICJ chartered a new course on the possibility of using national courts to enforce its decisions. The matter is not simple, though, because national courts are bound by internal doctrines such as the political question doctrine and the doctrine of separation of powers, which limits their ability to be active enforcers of international decisions. Nonetheless, while it was found that there is no absolute obligation on national courts to enforce ICJ decisions, equally, there does not seem to be an absolute prohibition on such action. It would thus seem that if the courts are able to overcome some of these difficulties, they might indeed have a role to play in implementing ICJ decisions.

An analysis of the current system used in the European Union (EU) reveals that the use of national courts to enforce supranational decisions is indeed an effective one and bears a greater return than if one body (like the Security Council) is set up to do the job. Consequently, this chapter will consider the building blocks of the EU court

system as a platform to the question of whether such a system can be transplanted into other systems, which will be considered in the final chapter.

Slaughter⁵²⁸ states that the U.S. Supreme court should have honoured the ICJ request as a matter of judicial comity. The principle being set out is that in the absence of an absolute international legal rule and except where it would be contrary to national law to do so, a domestic court should honour the decision of an international court as a matter of courtesy. *LaGrand* was a perfect display of the tensions that exist between international law and domestic law. Slaughter's response to this is judicial comity, what she describes as the lubricant of transjudicial relations.⁵²⁹ This chapter will thus deal with this concept of judicial comity and consider its effectiveness as a ground upon which courts can rely to implement ICJ decisions.

Chapter 6 thus seeks to draw conclusions about how domestic courts can relate to international courts in the future by looking at the subject of judicial comity. The European Union system will be examined as an example of judicial co-operation. The specific issues that will be addressed, which were all implicit in the trilogy of cases that are the subject of this thesis, are the following:

- 1 Is there a legal understanding of comity that can facilitate the resolution of disputes where there are international law and municipal tensions?
- 2 Could the United States have enforced the ICJ decision in *LaGrand* as a matter of comity?
- 3 Is the EU system adaptable to other parts of the globe?

After concluding that there is no existing international legal rule that mandates that national courts be active enforcers of international decisions, this chapter seeks to examine the remaining ground upon which it is alleged that national courts should enforce ICJ decisions in *LaGrand*-like cases.

⁵²⁸ Slaughter Agora: Breard. "Court to Court" (1998) 92 *Am. J. Int'l L* 711.

⁵²⁹ *Ibid.*

6.2 THE EXAMPLE OF THE EUROPEAN UNION

The make-up of the European Union is an example of a progressive network of courts that has captured the heart of international law as an integrative body of laws. The European Court of Justice (ECJ) is a prototypical example of supranational adjudication. Supranational adjudication is adjudication by a tribunal established by a group of states or the entire international community and that exercises jurisdiction over cases involving both states and private individuals.⁵³⁰ Traditional international adjudication by contrast, involves only state to state litigation.⁵³¹ The ICJ is therefore an example of the latter and as such it is immediately distinguishable from the ECJ.

The European Community (now referred to as the European Union) was established in 1957 in an effort to unify its member countries, who were historical enemies.⁵³² Thus the purpose of the union was to prevent a resurgence of the hostilities that had led to the world wars. This system shows how judicial co-operation can work and is thus an example for the world at large. The distinguishing factor about the European Union is the remarkable incorporation of national courts into the community framework. The national courts of the European Union are responsible for the implementation of directly enforceable community rights within the national sphere.⁵³³ These national courts operate within their own specific national order and the judges are appointed and act in terms of the national constitutions. Yet at the same time, these courts are tasked with the implementation of European Court of Justice (ECJ) decisions in certain circumstances.⁵³⁴ Integration in the system has been achieved by the operation of two doctrines: the doctrine of supremacy (which places community law above national law) and the doctrine of direct effect (which makes all

⁵³⁰ L Helfer and A Slaughter "Towards a Theory of Effective Supranational Adjudication" (1997-1998) *Yale L.J* 273 at 287.

⁵³¹ *Ibid.*

⁵³² Jones "Opinions of the European Union in National Courts" (1995-1996) 28 *N.Y.U.J. Int'l L. & Pol.* 275.

⁵³³ Maher "National Courts as European Community Courts" (1994) 14 *legal Stud.* 226.

⁵³⁴ *Ibid.*

rights under community law directly accessible to individuals).⁵³⁵ In addition to this, the integration of the community is strengthened by the inclusion of certain clauses in the Treaty Establishing the European Community that have the effect of giving more power to national courts.⁵³⁶

6.2.1 The Treaty Establishing the European Union

Part Five of the Treaty Establishing the European Community (EEC Treaty) sets up a number of institutions: the European Council and European Commission, which initiate and adopt legislation,⁵³⁷ the European Parliament, which considers legislation to be adopted⁵³⁸ and the European Court of Justice, which adjudicates claims and is tasked with the adjudication of disputes that concern Union Law.⁵³⁹ Three groups are given *locus standi* in the court: the EU institutions, member states of the EU and nationals of the member states.⁵⁴⁰ The ECJ thus has wider jurisdiction than the ICJ because not only the member states, but individuals may submit a matter to the ECJ. A second and noteworthy difference is that the ECJ does not have jurisdiction by consent in the same way that the ICJ does. In this sense, it stands in a similar position to that of an Appeal Court on the domestic plane.⁵⁴¹

⁵³⁵ This was established in the case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration [1963] 1* where the court noted that the European legal order grants rights to individuals without the need for implementing legislation (accessed at <http://www.curia.eu.int/en/content/juris/index.htm> on 16 March 2006).

⁵³⁶ Maher 1994 *Legal Stud* 226.

⁵³⁷ Part Five, Section 2 and 3 of the EEC treaty respectively.

⁵³⁸ Part Five, Section 1 of the EEC Treaty.

⁵³⁹ Part Five, Section 4 of the EEC Treaty.

⁵⁴⁰ Art 173 of the EEC Treaty.

⁵⁴¹ A matter can come before the ECJ in one of four ways. Firstly, as a result of a 'reasoned opinion' by the European Commission stating that one of the member states is in violation of its rights under the EEC Treaty (Art 169 of the EEC Treaty). Secondly, one member states may bring another member before the ECJ on the basis that it is in violation of an obligation under the EEC Treaty (Art. 170 of the EEC Treaty). Thirdly, a natural person may bring an institution before the ECJ to protest a decision (Art. 173 of the EEC Treaty) and finally a matter may be submitted to the ECJ through a process of referral through a preliminary opinion (Art. 177 of the EEC Treaty).

One of the most remarkable features of the EU legal community is the extent to which national courts have been drawn into the enforcement process of ECJ decisions. There is thus clear co-operation between the national courts of EU member states and the ECJ. This co-operation may be attributed to a collection of provisions in the EEC Treaty that give the national courts such power. These provisions will be analysed in turn.

6.2.1.1 The principles of direct effect and supremacy

In the 1978 case of *Amministrazione delle Finanze v Simmenthal*,⁵⁴² the following was said:

“Every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly **set aside any provision of national law which may conflict with it**, [own emphasis] whether prior or subsequent to the Community rule.”

In this case, the ECJ was confirming the already established rule that private individuals have rights and obligations under EEC law and also that EEC law was superior to national law. This position has come to be known as the ‘doctrine of direct effect’ and the ‘doctrine of supremacy’ respectively.⁵⁴³

Direct Effect

In terms of the doctrine of direct effect, individuals have rights that are directly effective⁵⁴⁴ which has had the effect of allowing maximum use of the court. In the case of *Van Gend en Loos*⁵⁴⁵ the court determined that the articles of the EEC Treaty

⁵⁴² Case 106/77 [1978] ECR at para 21. Available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61977J0106. (Accessed on 25 February 2006).

⁵⁴³ Maher 1994 *Legal Stud* 1 fn 2 and 3.

⁵⁴⁴ *Van Gend en Loos* case *supra*.

⁵⁴⁵ *Supra*.

create rights and obligations of individuals. In *casu* the court stated that the objective of the EEC treaty is to establish a market that serves all interested parties in the community. The court found further that this meant that the treaty existed not just for the member states, but also for its peoples. This was supported by the preamble, which refers not only to governments but people.⁵⁴⁶

The court was thus stating that the rights contained in the EEC treaty were not only designed to privilege states, but also its peoples. The effect of this is that courts have an obligation to protect the rights of individuals where their EEC treaty rights have been violated. This is different to the situation of domestic courts and the ICJ. The decisions of the ICJ are not directly enforceable, because technically ICJ decisions should not have direct impact on individuals. The events in the trilogy are a challenge to this presupposition. The facts of these cases show that although rare, it is possible that individuals would be directly affected by ICJ decisions. The enforcement of such decisions is thus crucial. It also follows that the best institutions to deal with such enforcement are the national courts. So the doctrine of direct effect is a powerful tool that allows national courts within the EU to protect the rights of individuals; a privilege not accorded to national courts when dealing with ICJ decisions.

The Supremacy of Community Law

It was said in the *Amministrazione delle Finanze* case that where a national court is called upon to apply any provision of community law, it is obliged to do so even where this may mean that conflicting provisions of national legislation are disregarded. Furthermore, it was held that the national courts need not wait for national legislature to set aside the conflicting national law before applying community law.⁵⁴⁷ Essentially, this case is authority for the fact that community law takes precedence over the laws of the member states. Through this doctrine of supremacy, the national courts of the EU member states have acquired a community function, and are obliged to apply the decisions of the ECJ as precedent. This position is opposite to the position of a domestic court vis-à-vis the ICJ. No system of

⁵⁴⁶ See section II at para B.

⁵⁴⁷ *Supra* at para 24.

precedent system applies from the ICJ, and to suggest that ICJ decisions should in some way be viewed as superior is simply unacceptable in international law.

These two doctrines have therefore been instrumental in creating an atmosphere for judicial co-operation.

6.2.1.2 The preliminary reference procedure

Article 177 of the EEC Treaty⁵⁴⁸ creates a preliminary reference procedure. In terms of this section, a member of the Union may request the court to make a decision on a matter prior to a hearing at the national level. This clause enables the ECJ to first interpret law and then such law is implemented by the national court.⁵⁴⁹ The national courts of the EU have accepted this system of referrals, which means they have implicitly accepted the supremacy of the ECJ in the hierarchy of courts.⁵⁵⁰ This is unlike the position of the ICJ, which is not viewed as supreme. The reason is simply that the ICJ is seen as operating in a different field, because very often it does not adjudicate on the same matters as national courts. The ECJ, however, is supreme in the same sphere as the national courts of the EU member states.

Article 177 is thus the clearest demonstration of the co-operative nature of the relationship between the ECJ and the national courts of EU member states.

6.2.1.3 The obligation on member states to implement ECJ decisions

In terms of article 169 of the EEC treaty, the ECJ can declare its member states to be in breach of their Community obligations, in which case the member state is obliged to comply with its obligations under article 171. 'Member state' has been interpreted

⁵⁴⁸ Available at <http://www.hri.org/docs/Rome57/Part5Title1.html#Pt5TitICha1Sec4>. (Accessed 16 March 2006).

⁵⁴⁹ Jones 1995-1996 *N.Y.U.J. Int'l L. & Pol* 285 states that "the courts of the member states treat the preliminary rulings of the ECJ pursuant to art. 177 as binding on all subsequent judgments in the same case. The German Constitutional Court even has gone so far as to explicitly integrate ECJ art. 177 actions into its constitutional hierarchy."

⁵⁵⁰ Jones 1995-1996 *N.Y.U.J. Int'l L. & Pol* 279-280.

to cover all organs of the state, including its judicial arm.⁵⁵¹ This clause empowers national courts to deal with governments that are in breach of community law. The national courts in the EU are themselves obliged to give effect to the EEC treaty, because they form the judicial arm of government. Not only are they bound by community law, they are also bound to ensure the implementation of community law, because a failure to do so would render them in breach of article 171.

It is interesting to note that if the ICJ statute had a similar clause, the implementation issue in *LaGrand* and *Avena* would have been clear. Take, for example, the comment by Weisburd⁵⁵² that:

“...the United States as an entity was obliged to obey the ICJ order, incurring international responsibility if it failed to do so. **It does not follow, however, that this international legal obligation required American courts to carry out the ICJ’s order.**” [Own emphasis]

If it were clear that all organs of the state are bound by ICJ decisions, then this comment would have been somewhat misplaced. Yet the relations between the ICJ and domestic courts are such that implementation is often seen as the responsibility of the executive and not the courts. The ECJ, in contrast, specifies (in art. 169 read with art. 171) that even the courts are subject to ECJ decisions and must enforce them when called upon to do so. It can be seen from the above that the position of national courts vis-à-vis ECJ decisions is not left to interpretation, but it is clear from the literal reading of the EEC Treaty.

6.2.1.4 National courts empowered against their recalcitrant governments

⁵⁵¹ See the case of *Commission of the European Communities v Kingdom of Belgium* [1970] ECR 237 at para 13-16 where the effect of the court’s decision was to say that obligations to comply with Community law fall on the whole state and not just the government (Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61969J0077#SM.) (Accessed on 9 July 2006).

⁵⁵² “International Courts and American Courts” (1999-2000) 21 *Mich. J. Int’l L.* 881 at 882.

Article 5 of the EEC treaty provides that the member states will take all appropriate measures to ensure the fulfilment of their obligations under the treaty. The ECJ has often looked to the European national courts to ensure compliance on the part of legislatures where there has been failure to comply with ECJ directives.⁵⁵³ Thus in the case of *Von Colson*,⁵⁵⁴ the ECJ indicated that as part of their obligation under article 5, national courts are required to interpret domestic law in a manner consistent with the relevant directive.⁵⁵⁵ The importance of the article 5 principle and its effect on national courts was elaborated upon in the case of *Francovich*,⁵⁵⁶ in which the court allowed for damages to be awarded against a national government where an individual had suffered loss as a result of the non-implementation of a directive. The impact of this decision was to increase the powers of the national courts as against recalcitrant governments. Consequently, the ECJ can rely on national courts to keep their own governments in check on the basis of article 5. This is an important aspect of Community law because ordinarily domestic courts are not willing to go against their governments, but article 5 ensures that they do so, failing which they are in breach of Community law.

The above clauses thus facilitate a community role for the member courts of the EU. It is also clear that the role of national courts in the EU as enforcers of community law is not done merely on the basis of courtesy, but is firmly entrenched in the EEC Treaty. So when considering the possibility of transplanting a similar system to relations between domestic courts and the ICJ, one must be mindful of the fact that

⁵⁵³ See further De Burca "Giving Effects to European Community Directives" (1992) 55 *MLR* 215 at 217.

⁵⁵⁴ Case 14/83 *Von Colson v Land N ordrhein-Westfalen* [1984] ECR 189. Available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61983J0014 (Accessed 16 March 2006).

⁵⁵⁵ In *casu*, the court was requested to set out the rules of community law in the event of discrimination, more specifically the interpretation of Council directive No 70/207/EEC of the 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The applicants requested whether the directive in question must be sanctioned by requiring an employer to employ the victim of discrimination. The case is available at <http://curia.eu.int/en/content/juris/index.htm> (accessed on 25 March 2006).

⁵⁵⁶ Case C-6& 9/90 *Francovich v Italian State* [1993] CMLR 66. Available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61990J0006 (Accessed 16 March 2006).

national courts in the EU are empowered by legislation, not merely goodwill and courtesy.

6.2.1.5 The Response of EU member courts to the ECJ

There have been varying responses to this system by national courts. For example, the Belgian courts have readily accepted the supremacy of community law.⁵⁵⁷ Many of the EU member states treat ECJ preliminary rulings as binding.⁵⁵⁸ The French Cour de Cassation (court of cassation) was the first of France's three Supreme Courts to respond substantially to the ECJ, even in the face of threats from the French legislature.⁵⁵⁹ Other courts have taken an opposite approach, such as the Italian Constitutional Court, which has stated that community law is supreme, all the while retaining the power to review community acts in light of their constitution.⁵⁶⁰

6.2.2 Lessons from the EU legal order

6.2.2.1 The benefits of using national courts as enforcers of supranational decisions

From the above it can be seen that the founding documents of the European community and their interpretation by the ECJ go a long way to integrate national courts into the system. Maher⁵⁶¹ states: "Court judgments can be seen as an assertion of a normative order – one that has the approval of the judges as impartial legal experts and one that reflects the constitutional traditions of the states."

⁵⁵⁷ In the case of *Belgium v Fromagerie Franco-Suisse "Le Ski"* (1972) CMLR 372-373, the Court de Cassation stated: "[W]hen the conflict is one between a rule of domestic law and a rule of international law having direct effects within the domestic legal order, the rule established by the treaty must prevail; its preeminence follows from the very nature of international treaty law. This all the more so when the conflict is one...between a rule of domestic law and a rule of community law."

⁵⁵⁸ See Jones 1995-1996 *N.Y.U.J.Int'l L. & Pol* 285 where she shows that the Irish High Court, the Danish Supreme Court, the German Constitutional Courts and the Greek Courts have closely followed ECJ decisions whilst many of the other member states have adopted a similar degree of deference by their unquestioning application of ECJ preliminary rulings.

⁵⁵⁹ See Plotner, "Report on France" in Slaughter *et al* (eds) *The European Courts and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (1998) 44-45.

⁵⁶⁰ Maher 1994 *Legal Stud* 238.

⁵⁶¹ 1994 *Legal Stud* 234.

This statement shows that national courts are in an optimum position to either work for the increase of international law into the domestic system or otherwise. This is clearly seen in *LaGrand* and *Avena*. Without all the complexities involved in the U.S. Supreme Court implementing the ICJ decision, it is undeniable that the Supreme Court is the best positioned to settle the matter, not only in terms of being able to set a precedent that lower courts will be bound to follow, but also in terms of settling the matter expediently.

Because individuals can approach the national courts to enforce ECJ decisions, this has greatly reduced the likelihood that national governments will ignore ECJ orders. It would thus seem that domestic enforcement of international or supranational decisions is one way to ensure compliance with orders. The down-side of the arrangement is that it will only work as long as national courts and the ECJ maintain their co-operative arrangement. At the end of the day, the judges who sit on the national court level are appointed by national governments and take oaths to that state.⁵⁶² This places a direct limit on the control that the ECJ can exercise over the national courts.

The central involvement of national courts in the application of community law has placed pressure on the member states to fulfil their community obligations. The fact that enforcement is brought home creates a greater atmosphere for accountability, which is far more effective than remote enforcement.

6.2.2.2 The dangers of using national courts as enforcers of supranational decisions

While revealing the benefits of using national courts to enforce supranational decisions, the European system also shows the complexities faced by national courts when their role is so expanded.

⁵⁶² *Ibid.*

The first problem has been touched upon. The judges in national courts are appointed within the domestic legal order and expected to function in terms of their own constitutions. Maher, says, as a result of this arrangement, national judges can never truly be community judges.⁵⁶³ In the first place, judges are promoted and paid within the domestic realm. There is thus no real incentive for allegiance to community law. Secondly, they are trained within the domestic realm so their culture and traditions are inevitably from the domestic laws. So there may be cases where national judges are not familiar with community law. This has resulted in a system that has foreseeable weaknesses. It would not be presumptuous to say that were there no legal obligation on national courts to enforce the ECJ decisions, they would not be likely to do so. The situation is thus very much like the ICJ and domestic courts. The major difference is that the European domestic courts are legally bound to enforce the decisions. Yet this problem is not an insurmountable obstacle. Member states often send judges as *referendaires*⁵⁶⁴ to the ECJ, where they receive training in community law and return to their national states to give legal expertise.⁵⁶⁵ Additionally, European law schools are now stressing the importance of Community Law in undergraduate programmes, so that in time, most judges will graduate already having some knowledge of Community law.⁵⁶⁶

A second problem with the European community arrangement is that there may be a blur between the roles of the legislature and the judiciary.⁵⁶⁷ Where a member state fails to implement a directive and is then forced to do so by a national court, it amounts to an intrusion by the judiciary into the legislative function. In such a case, it would seem that the ECJ is calling on national courts to make laws, a role that is confined to the legislature in democratic societies. In essence, the problem with national courts taking such a central role in integration is that there is a fine line

⁵⁶³ 1994 *legal Stud* 235.

⁵⁶⁴ These are law clerks from the ECJ, often drawn from the ranks of judges, lawyers, legal academics and legal administrators. See Kenney "Beyond Principals and Agents: Seeing Courts As Organizations By Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court" (2000) 33 No 5 *Comparative Political Studies* 593 at 595.

⁵⁶⁵ Maher 1994 *Legal Stud* 235.

⁵⁶⁶ See Goode "The European Law School" (1993) 13 *Legal Stud* 1 at 13-14.

⁵⁶⁷ Maher 1994 *Legal Stud* at 237.

between application of supranational court decision and the intrusion into foreign policy lawmaking. The disadvantage with this is aptly summed up in the following words: “If the national courts are seen to be politicized, they may lose some of their authority and legitimacy which is predicated to such an extent by their neutrality.”⁵⁶⁸

One notable aspect of the European system, briefly referred to above, is the fact that although the ECJ decisions must be implemented by national courts, the exact remedy and the procedural rules followed in the implementation process are left entirely up to the court. The so-called margin of appreciation doctrine is applied by the court, which allows a state appearing before it some leeway on how to the court is to implement the rights within its territorial borders.⁵⁶⁹ The potentially intrusive nature of the arrangement is thus averted by the application of this doctrine. Gross and Ni Aolain⁵⁷⁰ say the margin of appreciation doctrine is a means through which the sovereignty of member states is balanced against the need to ensure that EU obligations are observed. It is a “realistic and appropriate tool through which an international court facilitates its dialogue concerning sensitive matter with national legal and political system and with their unique values and particular needs”.⁵⁷¹

6.2.3 Concluding remarks

Thus the European legal system has gone a long way to integrating the European community. The role of the national courts in this process has been significant. Although not a perfect system, it is a good example of how the rift between domestic

⁵⁶⁸ *Ibid.*

⁵⁶⁹ Gross & Aolain “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights” (2001) 23 *Hum. Rts. Q.* 625 at 626.

⁵⁷⁰ *Ibid.*

⁵⁷¹ Gross & Aolain 2001 *Hum. Rts. Q.* 627. Whilst some recognise this as strength, other criticise the doctrine on the basis that it is too obscure. Some opinions have been held very strongly. For instance, Lord Lester of Herne Hill, “The concept of the margin of appreciation has become as slippery as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake... the danger of continuing to use this standard less doctrine of the margin of appreciation is that ... it will become the source of a pernicious ‘variable geometry’ of human rights, eroding the *acquis* of existing jurisprudence and giving undue deference to local conditions, traditions and practices.” (See Gross & Aolain 2001) *Hum. Rts. Q.* 627 at fn 13).

rules and international or supranational standards can be reconciled through the medium of the judiciary. The ECJ has found the balance of supervising the process through interpretation without intruding into the domestic states. The fact that remedies and procedures are left up to the national courts means their sovereignty as state courts is not compromised, while ensuring the application of Community law standards. However, Maher poses a very significant question: to what extent can these national courts be truly European Community courts?⁵⁷² It has been shown that their community role is limited – after all, they are national courts whose allegiance is owed to their national states since they are both paid and promoted within the national sphere. Consequently, whilst national courts are enforcers of community law, they cannot ever be community courts since their legitimacy may be questioned if they are too active in their roles as community courts.

Nonetheless, the European system is an example of a community that has attempted to keep abreast with globalisation by creating a framework that supports integration. At the heart of the system are the national courts of the member states. Whether this system is transplantable to the ICJ however is doubtful. On the one hand, the ECJ is a supranational institution which means it has powers to make decisions that directly affect both individuals and states. On the other hand, it is an institution whose decisions are binding on national courts in terms of Community Law. No such support structure and authority exist for the ICJ since there is no system of *stare decisis* and decisions are binding only on the parties before the ICJ. In spite of these significant differences, it is interesting to note that the very weaknesses of the European legal system are also raised as reasons why domestic courts cannot enforce ICJ decisions. This is significant, because it shows that so-called barriers to national court enforcement of ICJ decisions are not in fact barriers in the true sense of the word, but challenges. Accordingly, it is well worth considering the use of national courts as enforcers of ICJ decision because the EU system, with all its weaknesses, has brought judicial co-operation and increased compliance to community law. The fact that the EU national courts are faced with the same challenges as any national court would, if it sought to enforce an ICJ decision, shows that the two systems are not worlds afar from each other in likeness.

⁵⁷² Maher 1994 *Legal Stud* 243.

It has been suggested that the European system cannot be seen as a model because it is network of countries on their way to becoming a federation.⁵⁷³ Whatever one's opinion might be on this issue, the point still remains that countries that were once enemies are today part of the same system. This says something about the role that national courts can play in bring integration were once there were differences. The question inline is whether such a system is adaptable in other places around the world. Unlike, the EU national courts, the rest of the world's national courts are not empowered by legislation to enforce ICJ decisions. Thus it begs the question: on what grounds can courts implement international decisions to bring about greater co-operation? This will be the subject of the next section.

6.3 JUDICIAL COMITY

The previous section highlighted two aspects about the EU legal order that are of significance to this thesis and add to the argument for a greater involvement of national courts in the enforcement of ICJ decisions. Firstly, it was shown that the main enforcers of ECJ decision are national courts, who are empowered to do so in terms of community legislation. Secondly, it was shown that the EU set-up, while different to the set-up between the ICJ and national courts, is not worlds apart. This is evidenced by the fact that the argument often raised against national court enforcement of ICJ decisions, such as the issue of separation of powers, forms the present weaknesses of the EU legal order. In theory therefore, the EU system should be adaptable to suit the ICJ-national court relations. In practice however, this is not so simple, because the European national courts are empowered by legislation while other national courts generally do not act in terms of such authority. A revision of the ICJ Statute is highly unlikely, so alternative means will have to be sought to justify the implementation of ICJ decision by national courts.

One such alternative is the doctrine of comity. This doctrine has elicited much discussion in academic circles for many years and more so recently.⁵⁷⁴ The baseline

⁵⁷³ Slaughter "Judicial Globalization" (1999-2000) 40 *Va. J. Int'l L.* 1103 at 1107.

⁵⁷⁴ See for example Ramsey "Escaping International Comity" (1997-1998) 83 *Iowa L.Rev* 893, Slaughter 1999-2000 *Va. J. Int'l L.* 1103, Lien "The Co-operative and Integrative Judicial Models of

argument is that if it is accepted that ICJ decisions have no binding effect on domestic proceedings, the ICJ decisions should still be afforded persuasive deference, at least on the basis of comity. The purpose of this section is to discuss the concept of comity and the likelihood of it being the ground upon which domestic courts can be compelled to enforce international decisions.

6.3.1 Defining Comity

Comity is an issue that has undergone much analysis in the last decade. The exact content of this term is uncertain, but it can at best be described as a value that entails sovereign nations respecting each other for the sake of convenience and courtesy.⁵⁷⁵ The term appears in judicial discourse where a party seeks the protection of a foreign judicial decision or the party contends that foreign law should apply in a particular case.⁵⁷⁶ Comity thus applies in a variety of situations, such as decisions on whether domestic, foreign, or international norms should prevail, the procedures of proving foreign law, the enforceability of foreign judgments and a decision whether to stay domestic proceedings pending the outcome of an international or foreign court decision.⁵⁷⁷

What is striking about comity is that although there is lack of consensus on its meaning, its use is widespread. When embarking on a study of the doctrine, it is immediately evident that there are as many definitions of comity as there are writings on the subject. It is therefore impossible to discuss all definitions of comity, but this section will be confined to those that raise certain problems with the doctrine or shed light on the research question. In the case of *Hilton v Guyot*⁵⁷⁸ the United States Supreme Court stated that comity is “neither a matter of absolute obligation on the one hand nor of mere courtesy and goodwill upon the other”. This definition is both

International Judicial Comity: Two Illustrations using Transnational Discovery and *Breard* Scenarios” (2000-2001) 50 *Catholic. [CORRECT?] U. L. Rev* 593, Paul “Comity in International Law” (1992) 32 *Harv. Int’l LJ* 1, Waller “The Twilight of Comity” (1999-2000) 38 *Colum. J. Transnat’l L* 563.

⁵⁷⁵ Paul 1992 32 *Harv. Int’l L. J.* 3.

⁵⁷⁶ Ramsey 1997-1998 *Iowa L. Rev* 893.

⁵⁷⁷ Lien 2000-2001 *Catholic. U. L. Rev* 598.

⁵⁷⁸ 159 US 113 at 163-164.

vague and confusing, and shows why comity has met much resistance in legal circles. On the one hand, the doctrine is not of a legal nature in the sense that there is no absolute compulsion on the court to apply a decision on the basis of comity. The question that follows is how, then, does one enforce the doctrine? It is not a legal doctrine in the sense that separation of powers is, and as such failure to implement comity cannot be sanctioned by law. Yet at the same time, it is not purely a moral rule in the sense that the law may not sanction a failure to implement comity. This is obviously confusing, and all that is certain is that comity falls somewhere between the measure of morality and law.⁵⁷⁹

A more recent and detailed understanding of comity tries to delineate between comity in a legal sense and comity in a general sense. According to Ezer and Bendor,⁵⁸⁰ comity can be understood as the expression of a foreign policy commitment, or it can be understood in the legal sense. An example of the former is when a court is induced to apply or enforce a foreign decision for the sake of promoting good relations, outside of any treaty obligation to do so. Comity in this sense is seen as exclusively political.⁵⁸¹ On the other hand, comity in the legal sense is when a court applies a foreign decision on the basis of some treaty obligation.⁵⁸² In this sense, comity is a legal consideration, making it a binding commitment. In essence, the writers say that comity can only be considered a legal doctrine when it is being applied pursuant to a treaty obligation. This then entitles a party to a consideration of its interest where such interest is disregarded. For example, the writers would say that United States courts should give effect to the ICJ decisions in *LaGrand* and *Avena* on the basis of comity because comity in this sense is simply an expression of their commitment as signatories of the VCCR. This form of comity is thus not merely a political expression, but a legal one.

⁵⁷⁹ See Paul 1992 32 *Harv. Int'l L J* 48.

⁵⁸⁰ "The Constitution and Conflict of Laws Treaties: Upgrading the International Comity" (2003-2004) 29 *N.C.J.Int'l L & Com.Reg.* 42. In this work, the learned writers contend that a treaty is the optimal expression of comity since it contains explicit legal commitments of one nation to another. As such, comity in treaty law has an upgraded function.

⁵⁸¹ *Ibid.*

⁵⁸² *Ibid.*

In effect, the writers are distinguishing between comity in a general sense and comity when applied pursuant to a treaty or some other legally binding obligation. They contend that it is only the latter form of comity that is enforceable in the sense that a country is legally entitled to a particular consideration. The main problem with this understanding of comity is that it is redundant. If comity is understood as an act of courtesy, then its being based on a legal obligation no longer renders it an act of courtesy. The public do not follow traffic laws as a matter of courtesy; they do so out of obligation. Likewise, a domestic court is obliged to enforce a foreign judgment if such enforcement is mandated by a treaty or other legally binding document not out of courtesy, but out of obligation. So the idea of comity based on a binding legal obligation makes no sense and yet again, there remains uncertainty about the boundaries of comity.

Slaughter⁵⁸³ builds on the basic definition of comity by describing its fundamental premise. She states that at the foundation of comity is the “appreciation of assignments and global allocation of judicial responsibility, sharpened by the realization that the performance of one court’s function increasingly requires cooperation with others ... [I]t does not import subordination or even the more subtle constraints of ritual deference.”⁵⁸⁴ Slaughter’s definition is a more grounded way of understanding comity, in that it is seen as a value whose foundation rests in the need for judicial co-operation. This is important, since the increasing connectivity of the world will increase the likelihood of laws conflicting. So, the first helpful aspect of Slaughter’s definition is that we see that the purpose behind the doctrine shows us why it must be given a place in international law. A second enlightening point of Slaughter’s definition is that she tackles the immediate discomfort that the doctrine raises. The mere mention of deference imports ideas of two bodies on an unequal footing, and the lower of the two submitting to the higher in the name of comity. Slaughter deals with this by asserting from the outset that comity is not about subordination.⁵⁸⁵ This finding is implicit in the understanding that comity is respect for sovereigns *qua* sovereigns, which tends to suggest two sovereigns on an equal

⁵⁸³ 1998 *Am. J. Int’l L* 711.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ See fn 597.

footing and not one higher than the other. In addition to this it shows that comity does not always mandate deference for the sake of an easy way out. Rather, it is recognition that courts across the world are entitled to their fair share of disputes as co-equals in the global task of judging.⁵⁸⁶ So understanding the heart of comity sheds more light on the concept than theorising around the idea.

Lien⁵⁸⁷ accepts comity as the informal and voluntary recognition that the courts of one nation accord to the judicial decisions of another. This definition best expresses what can be termed judicial comity. Judicial comity is seen as the deference of one court to another foreign court *qua* court for a myriad of reasons, one of which is the recognition of “a kind of legal globalisation” both influencing and influenced by economic globalisation. Slaughter⁵⁸⁸ describes this as a global community of law, established not by the world court, but by national courts working together around the world. This definition shows what is more clearly the idea of comity as judicial courtesy. Such courtesy is not of a legal nature and is therefore unenforceable. It rests solely on the goodwill of the parties involved.

In considering these various definitions it is clear that there is no agreement on the exact content and boundaries of the comity doctrine. While the baseline understanding is the same, the concept is so fluid that it allows much room for a personal interpretation. The fact that authors appear to extend the concept without boundary is evidence of this. The idea of comity can at best be understood as a value. None of the definitions considered above give the doctrine any form of legal force, excluding that of Ezer and Bendor, which in itself does not appear to make sense. It is obvious that whilst values may inform the laws, the law is not equal to the values. Decisions are made not on the basis of values, but laws. It is this fluid understanding of comity that has given rise to much critique of the doctrine.⁵⁸⁹ There are even different applications

⁵⁸⁶ Slaughter 1998 *Am. J. Int'l L.* 709.

⁵⁸⁷ Lien 2000-2001 *Catholic. U. L. Rev* 593.

⁵⁸⁸ 1999-2000 *Va. J. Int'l L.* 1114.

⁵⁸⁹ Indeed this doctrine is so flexible that Lien points out that the use of word ‘doctrine’ is inapposite since it connotes something fixed or grounded. Thus she suggests that comity can more accurately be referred to as a value (Lien 2000-2001 *Catholic. U. L. Rev* 599).

of comity; such as legislative comity,⁵⁹⁰ but this work is confined to the boundaries of judicial comity. At the end of the discussion, we are not much better off than the beginning. The merits of comity can be appreciated, but without the requisite boundaries, what began as a good value may well turn into something undesirable. So while it is clear that comity can lubricate relations between the ICJ and national courts, it is not clear where the boundaries of the doctrine lie. Such boundaries are essential to the maintenance of the rule of law; the idea being that judges should act within the boundaries of the law. The problem with comity is that there exists a danger that judicial intuition or gut feel (albeit with good intentions) will replace sound judgments based on existing and recognised legal principles. Without an understanding of the boundaries of comity, we cannot distinguish between an abuse of the concept and its legitimate use. Can this concept nonetheless be the grounds upon which US courts should consider ICJ decisions binding? This question is dealt with in the next section.

6.3.2 The Case for Comity

The comity doctrine has often been discussed in the context of the horizontal relationship between courts interacting across borders. Lien⁵⁹¹ suggests two models of comity that promote judicial co-operation; co-operative comity and integrative comity. Both models are designed to shape responses to international law conflict. The co-operative judicial model applies on a horizontal level when domestic courts face conflicts with foreign courts or tribunals. The integrative model, however, applies between courts on a hierarchical level; that is, national courts and international or supranational courts and tribunals.

This model is enlightening, because it makes a distinction between judicial relations between foreign courts (which often occurs in the context of private international level and therefore involves very little political repercussion) and judicial relations between the national courts and international or supranational courts (which often has

⁵⁹⁰ See the case of *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993), where legislative or 'prescriptive' comity was described as the respect sovereign nations afford each other by limiting the reach of their laws.

⁵⁹¹ 2000-2001 *Catholic U. L. Rev* 594.

gross political implications). It is easier to see how comity can work on a horizontal level; that is, as between two foreign courts. This is the classic case of the private litigant who wins a case in a foreign court, then returns to have the order enforced or recognised in the court of another state. It is also where two foreign courts simultaneously have jurisdiction over a matter arising out of the same cause of action. Comity is required in such situations because there are no legal rules dictating that the matter should be heard in any one court. Were the second court to recognise the judgment of the first, this would be purely as a matter of courtesy and not as a matter of law *per se*.

Comity on the hierarchical level, however, is a lot more difficult to envisage. A hierarchical system by definition suggests that there is an inbuilt system of authority that binds the lower court to the decision of the higher. This description is an acceptable description of the relationship between national courts and supranational adjudicative bodies. Thus the relationship between a state court and the inter-American Court of Human rights, or the court in a member state of the European Union and its relationship between the European Court of Justice are such examples. But a closer look at the relationship between the ICJ and domestic courts shows otherwise. To assert that the ICJ is an authoritative body over domestic courts would not be entirely accurate. This research is premised on international law and national law being supreme within their own jurisdictions. Thus the ICJ is an authoritative body in its own sphere. This means it has authority over international law related matters and further it only has authority on the basis of consent. But even then, it cannot dictate domestic law matters to its member states. It is here that judicial comity plays its role. Using the *Breard* scenario as an example; it was argued that the courts did not have an absolute legal obligation to adhere to the ICJ provisional measures order since it was not established that such orders were binding.⁵⁹² It is argued that even in the absence of an express rule showing the binding nature of provisional measures, the United States courts should have obeyed the ICJ order as a matter of comity or respect.⁵⁹³ The case was thus a perfect demonstration of the need for comity

⁵⁹² This is the effect of Slaughter's argument in her commentary on *Breard* (1998 *Am. J. Int'l L.* 711).

⁵⁹³ *Ibid.*

in judicial relations. After the ICJ's final order indicating the binding nature of provisional measures orders, the issue was no longer one of courtesy, but one of law.

So it would seem that comity is not just useful, but necessary, to enable the smooth flow of judicial interactions across the globe. One of the effects of globalisation is to increase interaction of individuals across the world and with this, conflict of laws is bound to increase in importance. It is thus essential that courts have some system to determine which courts will have jurisdiction. In respect of public international law matters, even in this sphere there must be room for comity. The problem of provisional measures orders as revealed in *Breard* and *LaGrand* provides a good example of why this is important.

6.3.3 The Case against Comity

Comity has been criticised as a value because its malleable character has often led people to resolve that courts resort to this value as a tactic to avoid explaining their reasoning in court decisions. It is for this reason that Ramsey advocates the abandonment of this doctrine,⁵⁹⁴ stating that its vagueness often results in obscure legal analysis. Standing alongside him is Joel Paul⁵⁹⁵ who believes comity to be an “unworkable standard that is neither mandated by international law nor justified on the basis of reciprocity, utility, courtesy or morality”.⁵⁹⁶ The former view seems more readily acceptable than the latter. It is undeniable that the formal content of the comity doctrine is very vague and there is no one fixed understanding of it. This does indeed make its application very anomalous, since it is subject to abuse by judges who may seek to use it as an escape hatch. The utility and courtesy of the doctrine, on the other hand, seems very clear. It is this very factor that underpins the doctrine: the idea that courts can respect each other *qua* courts. In this sense, the preferred position would be that of Slaughter, who supports judicial comity on the basis that it is the respect owed to the laws and acts of other nations by virtue of common membership in the

⁵⁹⁴ Ramsey 1997-1998 *Iowa L. Rev.*

⁵⁹⁵ Paul 1992 *Harv. Int'l L. J.*

⁵⁹⁶ See generally Paul (*ibid*).

international system – a presumption of recognition that is something more than courtesy, but less than obligation.⁵⁹⁷

The utility of comity is thus accepted, but there are instances when its use should be limited. In the types of cases mentioned above, where there is dual jurisdiction or no legally binding rule upon which a decision can be enforced (like the provisional measures order pre-*LaGrand*), comity is not just useful but a necessity. However, such instances can be distinguished from the current problem facing the US Courts post-*Avena*. In many of the works in which the implementation of the ICJ decision in *LaGrand* and *Avena* is discussed, many authors begin by setting out the legal grounds upon which they believe US Courts should implement the decision. Invariably, the idea of comity emerges, although the word ‘comity’ is not explicitly used.⁵⁹⁸ Thus arguments are put forward whose content is embodied in the doctrine of comity. In essence, comity is being advocated as one ground upon which US domestic courts should implement the ICJ decision. The problem is that the nature of this case is distinctly different from the cases described above.

As a starting point, it has been shown that comity is usually applied where there is concurrent jurisdiction and one court must defer to the other as a matter of courtesy to avoid litigating twice on the same issue. This is not uncommon in cases involving two foreign courts. It is, however, rare in cases involving domestic courts and international or supranational courts. This is for the simple reason that the issues before the ICJ are usually very different from the issues raised in domestic courts, even if they arise out of the same facts. Thus the context is different, which renders the application of the comity doctrine different. According to Bradley, another problem raised by comity being applied to the situation post-*LaGrand* is that it often

⁵⁹⁷ Slaughter “A Global Community of courts” (2003) 44 *Harv. Int’l L.J.* 205.

⁵⁹⁸ See for instance Quigley 2002 *Yale. J. Int’l L.* 440 who suggests that the U.S. courts implement the ICJ decision based on reciprocity, and Schiffman “Breard and Beyond: The Status Of Consular Notification And Access Under The Vienna Convention” (2000) 8 *Cardozo J. Int’l & Comp. L.* 27 at 58, who suggests that U.S. courts should afford international tribunals ‘respectful consideration’ in the name of harmony, and White “A New Remedy Stresses The Need For International Education: The Impact of The *LaGrand* Case On Domestic Courts Violation Of Foreign National’s Consular Relations Rights Under The Vienna Convention” (2003) 2 *Wash. U. Global Stud. L. Rev.* 295 at 310, where reciprocity weighs heavily in his argument for implementation of the ICJ decision.

works in civil; not in criminal, cases.⁵⁹⁹ He states that a French contract decision may be enforced in a New York court, but generally comity is not given to penal or criminal decisions of other states.⁶⁰⁰

Apart from the fact that the circumstances post-*Avena* do not suit an application of comity, there is the problem of the undefined nature of the concept. It has already been shown that there are various definitions of comity. Although case law has set out the basic concept, this basic definition has been built upon. The main problem with this is that it defies the element of certainty and predictability that the law should have. It cannot be accepted that US courts should defer to the ICJ on the basis of such a vague concept. Such a move would set a dangerous precedent that would replace rulings based on well established legal principles with rulings based on intuition.

A further problem with the doctrine of comity is that it simply does not have enough force as law. A legal principle is one for which there is a sanction for failure to observe the rule. A value, on the other hand, is sanctioned by the omission of the good thing that could have been gained. In this way, comity seems to be a value because there is no sanction for failure to consider comity, apart from the fact that one may miss out on the privileges of comity, such as good international relations. Thus, comity appears to be more of a value than a law. Domestic courts cannot be bound to implement ICJ decisions on the basis of morals. No doubt morals and values inform most of our law, but these values are only considered by courts insofar as they are given legal expression. Bearing this in mind, comity cannot be accepted as a good medium through which individual rights can be vindicated.

Finally, and probably the most convincing reason why domestic courts cannot be obliged to enforce the decision in *Avena* and *LaGrand*: there simply is not enough legal authority on the subject. Whilst the law must be developed, it cannot be developed in a vacuum. It must be set up against the backdrop of existing laws. In this area, there is not enough case law to corroborate a case for comity. This point is raised

⁵⁹⁹ Bradley, Fidler-Damrosch, & Flaherty "Medellin v Dretke: Federalism and International Law" (2004-2005) 43 Colum. J. *Transnat L.* 667 at 683.

⁶⁰⁰ *Ibid.*

by Weisburd in his criticism of Slaughter's argument for comity.⁶⁰¹ He points out that Slaughter makes reference to only three cases in her argument for comity, which according to Weisburd are distinguishable from the facts in *Breard* or *LaGrand* and *Avena*.⁶⁰²

6.3.4 Final Remarks on Comity

Comity is thus not a straightforward issue, but is nonetheless important because it would seem that the world is moving from a place of independence and sovereignty to a place of interdependence and comity. This move has implications for the attitudes of local judges and courts towards the international court. In an age where commerce and technology have connected the world, it is not surprising that there is increased adjudication across the borders and it can be expected that in the future there will be more conflict between domestic law and international law. Consequently, there is great merit in the argument of those like Slaughter, since there must be some recognition given to the wider judicial fraternity. Yet, while recognising the importance and the place of comity in a globalised society, one does not want to throw caution to the wind. Courts are places for the interpretation and application of law, and not merely values. Thus decisions must be made on the basis of existing legal laws and not intuition or gut-feeling. There is too little authority on the subject of comity to mandate an application of the doctrine. Without such authority to guide and limit the scope of the doctrine there is danger of abuse. In view of the above, comity is too vague a concept to be the only basis upon which domestic courts should implement ICJ decisions.

6.4 CONCLUSION

This chapter has shown that the European Union has achieved relative success in integrating the community using the vehicle of the national courts as the enforcers of the ECJ decisions. The chapter has also looked at the possibility of advancing this to

⁶⁰¹ Weisburd 1999-2000 *Mich. J. Int'l L.* 924-925.

⁶⁰² Weisburd (*ibid*) suggests that the three cases quoted by Slaughter involved a court's determination that the interest of the parties could be protected substantially as well in a foreign as in a local court; whereas in the *Breard*, the case involved public and not private interests.

other courts in the world, through the doctrine of judicial comity. It has been said that such advancement, although desirable, is hampered in practice by problems of politics, such as separation of powers and national interests. The EU legal system has circumvented these problems to an extent, by incorporating the role of national courts in their community legislation and creating binding obligations to implement decisions of the ECJ. No such structure exists between domestic courts and the ICJ. Further, it is not likely that the ICJ Statute will be amended to allow such powers.

In the absence of a binding legal basis upon which domestic courts could implement ICJ decisions, the chapter considered the possibility of comity as grounds for active enforcement by domestic courts. It was argued that although the utility of the doctrine is undeniable, its application is precarious because of its undefined content and imprecision. However, a balance was advocated in terms of comity being used in appropriate cases, even where public law interests are at stake, such as was the case in the provisional measures order pre-*LaGrand* or in cases of concurrent jurisdiction. There is enough legal authority to warrant such a position. However, to extend the application of the doctrine to situations such as the current situation that US courts find themselves in would be complex. There is simply not enough legal evidence to back up such a position.

In conclusion, the EU system has succeeded because of deliberate measures placed in its founding documents that enable judicial co-operation: integration has not come by mere courtesy. Needless to say, judicial co-operation in the rest of the world will not come by courtesy alone. The application or enforcement of a foreign or international judgment reflects a country's willingness to cede its sovereignty in favour of judicial courtesy. It is unlikely that comity will ever become widely accepted. In practice, national interest occupies a major part in the decision making of governments, of which the judiciary is but one arm.

CHAPTER 7

CONCLUSION

Contents

1 Introduction

2 Conclusions on the Position of U.S Law after LaGrand and Avena

3 National Courts as Direct Enforcers of ICJ Decisions

4 Conclusion

7.1 INTRODUCTION

The heart of this thesis is about changing worldviews in modern international law. These changes have been both the impetus and the result of globalisation. On the one hand, basic principles of international law are being revised in response to globalisation,⁶⁰³ whilst at the same time, the world is becoming more globalised as international law moves from a place of independence to interdependence. The impact of globalisation on international law is too vast a topic to be tackled in one thesis, so the research was narrowed down to the issue of enforcement of international decisions by national courts, more specifically, enforcement of ICJ decisions by national courts.

Chapter 2 of this thesis thus showed changing perceptions of foundational theories such as sovereignty, nationalism, monism and dualism. The chapter showed that overall, there is a move from independence and sovereignty to inter-dependence and accountability. This is clearly exemplified by the intolerance in contemporary academia of principles or decisions that are aimed at isolating the state from international influence in the name of sovereignty.⁶⁰⁴ Even the idea of sovereignty

⁶⁰³ See Chapter 2 for examples.

⁶⁰⁴ See discussion on sovereignty in Chapter 2.

itself has metamorphosised from its original Westphalian sense into a more liberal notion.

Chapter 3 and Chapter 4 of the thesis show how this transformation process has begun in the international court. The chapters show how the Court is empowered and acts in terms of very strict terms, yet in spite of this it took a bold decision in *LaGrand*⁶⁰⁵ and ruled in a matter that implicated domestic legal proceedings; a highly controversial and unusual move. Underpinning the court's decision was a recognition of the need for accountability in treaty relations and the fact that even national courts are subjects of international law.

Chapters 5 and 6 then continued in the same vein by considering the possibility of national courts being active enforcers of ICJ decisions. The *Breard*⁶⁰⁶, *LaGrand*⁶⁰⁷ and *Avena*⁶⁰⁸ cases were again used to give the research some practical import. Chapter 5 thus analysed the response of the US courts to the ICJ decisions. It emerged from this analysis that there are certain democratic structures that act as barriers to the enforcement of ICJ decisions by national courts. It was said that these hurdles should in some instances be seen as challenges at best, because they are not insurmountable. Chapter 6 then looked at the EU model as a model for enforcement and the concept of judicial comity as a ground upon which it can be argued that national courts should enforce international decisions. It was said that although the EU model is similar to the relationship between the ICJ and national courts, the few differences that do exist are crucial. Enforcement through the agency of national courts is therefore unlikely to occur with the same pattern of certainty, since such enforcement is not entrenched in the founding provisions of the ICJ statute. Neither is it likely that change can be

⁶⁰⁵ [1999] ICJ Reports 9 (3 March). Accessed at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> on 27 January 2006.

⁶⁰⁶ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States)* (judgment of 10 November 1998). Accessed at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm> on 29 January 2006.

⁶⁰⁷ *Supra*.

⁶⁰⁸ *Avena and Other Mexican Nationals (Mexico v United States of America)* judgment of 31 March 2004). Accessed at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> on 27 January 2006.

initiated through the concept of judicial comity, which is too vague a term to rely on at this stage of international law development.

In this closing chapter, I will extract the main threads of argument from the previous chapters as a build-up to the essential questions: why are national courts the answer to improved implementation of international decisions, and how can this be achieved? In answering this question I will consider how U.S. domestic courts can resolve the tensions that they are faced with post-*Avena*.

7.2 CONCLUSIONS ON THE POSITION OF U.S. LAW AFTER *LAGRAND AND AVENA*

The ICJ decisions in *LaGrand* and *Avena* are binding on the U.S. firstly because the U.S. has consented to the jurisdiction of the ICJ by being a signatory to the Optional Protocol.⁶⁰⁹ Secondly, it has an obligation to enforce the obligations under the VCCR as a signatory to the treaty.

The act of submitting to the ICJ jurisdiction in itself holds certain foreseeable consequences. Firstly, there is the risk of leaving the nation's future in the hands of foreign judges and secondly, the risk of facing an adverse order. In spite of all these risks, the U.S. consented to the Court's jurisdiction. In essence they were committing to be bound by whatever decision the court would make in the matter. The U.S. placed no limitations or qualifications to its consent to judgment. The obligations referred to above are not obligations incurred under compulsion, but voluntarily. The VCCR is a treaty that was adopted under article 11 of the United States Constitution, by Congress itself.⁶¹⁰ Furthermore, such adoption was a unanimous decision of Congress.⁶¹¹ The question is, what did the United States consent to? It can be generally accepted that the U.S. consented to observe all the terms of the Treaty and

⁶⁰⁹ See *LaGrand* judgment of 27 June 2001 at para 15.

⁶¹⁰ Tiefenbrun "The Role of the World Court in Settling International Disputes: A Recent Assessment" (1997-1998) 20 *Loy. L.A. Int'l & Comp. L.J.* 25.

⁶¹¹ Bradley & Damrosch "Discussion: *Medellin v Dretke*: Federalism and International law" (2004-2005) 43 *Colum. J. Transnat'l L.* 667 at 675.

ensure that all obligations as contained in the Treaty would be observed. No state can possibly envisage every consequence that would arise from assenting to a particular treaty. It is understandable that the ICJ's finding that Article 36(1) of the VCCR had the character of an individual right might have been a surprise to the U.S. The preamble to the VCCR provides that the state parties to the Convention realise that the purpose of the convention is not to benefit individuals, but to ensure efficient performance of functions by consular posts.⁶¹² This tends to suggest that the VCCR does not in fact confer individual rights. Despite this, the ICJ's interpretation of the Treaty is binding on the United States. This is a risk inherent in adjudication as a mechanism for dispute resolution.

Whether one accepts the decisions of the ICJ as correct or not, it is clear that they are binding on the U.S. The only question open to the U.S. is one how to implement them.

7.2.1 The ICJ decisions in *LaGrand* and *Avena* should be implemented by U.S. Courts

In addition to the ICJ rulings being binding on the United States generally, it was shown that its implementation is best left to the U.S. courts for reasons already enumerated in Chapter 5 of this thesis. The main point is to reiterate that this finding is in no way unconstitutional or contrary to any U.S. state law.

As a starting point, the nature of the VCCR is such that it is self-executing, this being a decision of the U.S. itself and not any external international body. Consequently, there is no need for empowering legislation before the Treaty becomes directly enforceable by national courts. National courts can thus apply the Treaty without any prior consent from Congress. Several objections are raised in this respect. Firstly, Bradley⁶¹³ draws a distinction between the international decision and its implementation. He says just because the ICJ ruled that the U.S. has to review and

⁶¹² Accessed at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf on 6 November 2006.

⁶¹³ Bradley & Damrosch 2004-2005 *Colum. J. Transnat'l L.* 677.

reconsider sentences and convictions, this does not indicate which body should deal with it.⁶¹⁴ In other words, there was no specific direction to the courts themselves. This is quite correct. The court did not directly address the U.S. national courts in *LaGrand*, but in *Avena*, it clearly stated that it national courts were best suited to deal with the case.⁶¹⁵ Implicit in this was an effort to clarify which branch of the US government should have been tasked with the duty in *LaGrand*.

Bradley⁶¹⁶ also argues that while it is accepted that the Treaty creates binding obligations on the United States, this does not mean in the circumstances that the ICJ decision is binding on the U.S. courts. He argues that if one were to assert that the U.S. courts are bound to apply the ICJ decision, it is on the basis of the Treaty and not the court's decision.⁶¹⁷ The problem with this point is that it is redundant. No distinction can be drawn in this instance between the Treaty and its interpretation.⁶¹⁸ Thus Damrosch⁶¹⁹ argues that the ICJ decision partakes of the same legal character as the Treaty itself because it is the authoritative interpretation of the Treaty.

The next problem is the constitutionality of national courts enforcing the ICJ decision. Quite simply, it would not be unconstitutional. Courts would not be meddling in matters in the realm of the executive, because although the case has political implications, it is really a legal issue in every sense. It has been said that to suggest that national courts are bound to follow, the ICJ decision is leaving the fate of the criminal justice system in the hands of foreign judges. Although there is some merit to this concern, in the circumstances it is inflated.⁶²⁰ While it is agreed that it is not the place of the ICJ to dictate domestic criminal policy, it must be pointed out that the ICJ

⁶¹⁴ Bradley & Damrosch (2004-2005) *Colum. J. Transnat'l L.* 678.

⁶¹⁵ *Avena* judgment of at para 141.

⁶¹⁶ Bradley & Damrosch (2004-2005) *Colum. J. Transnat'l L.* 681.

⁶¹⁷ *Ibid.*

⁶¹⁸ Bradley & Damrosch (2004-2005) *Colum. J. Transnat'l L.* 686

⁶¹⁹ *Ibid.*

⁶²⁰ Bradley & Damrosch (2004-2005) *Colum. J. Transnat'l L.* 623.

was cognizant of this fact.⁶²¹ It is for this reason that the means of implementation was left to the U.S. As a result, the matter and the fate of the justice system is left to U.S. officials and not foreign judges.

In sum, the U.S. failed to apply a standard set internally. At the heart of *LaGrand* was an appeal to take account of Consular Relations Convention violations in cases where detainees were sentenced to severe penalties.⁶²² There are technical issues that are very difficult to take into account when considering the place of international law in domestic law. As a result it is quite acceptable that before a nation will implement an international decision, it must first be authorised by municipal legislation. It must equally be acceptable that where a treaty is deemed self-executing, the intention is to create an exception to this general rule.

Final remarks

As international law developed and the effects of globalisation became more widespread, it became apparent that international legal principles could no longer be shelved by states. As a result, many states now make provision for international law in their constitutions in order to contextualise the international rights in the domestic law.⁶²³ The supremacy clause⁶²⁴ in the U.S. Constitution is similar in this respect in that it sets out the place of treaty law and the parameters of its application within the federation. Thus if ever there is a dispute as to the effect of a treaty within domestic law, the supremacy clause shows how much attention must be paid to that Treaty. Article 6 was clearly interpreted in the case of *Ware v Hilton*.⁶²⁵ This measure is not

⁶²¹ *LaGrand* judgment of 27 June 2001 at para 125.

⁶²² Aceves "International Decisions: *LaGrand* Case" (2002) 96 *Am. J. Int'l L* at 218.

⁶²³ South Africa is a prime example of this in that it clearly defines the role and place of international law within the Republic. Section 39(1)(b) of the Constitution of the Republic of South Africa provides that when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law.

⁶²⁴ Article 6, Clause 2 of the U.S. Constitution.

⁶²⁵ 3 U.S. (3 Dall) 199 (1796) at 236-237. "A treaty cannot be the supreme law of the land, that is, of all the United States if any act of a State Legislature can stand in its way...It is the declared will of the people of the United States, that every treaty made, by the authority of the United States, shall be superior to the Constitution and Laws of any individual state, and that their will alone is to decide."

one that came into the United States as a result of external pressure; it is a standard set by Congress itself and not some international body.

I thus conclude that the decision of the ICJ in *Avena* is binding on the U.S. and further it must be implemented not by Congress or the Executive, but by the judiciary at a federal level, since they are empowered in terms of US domestic law to do so. It has already been said that although there is no express international law that mandates that national courts should enforce ICJ decisions, the scenario presented for the U.S. by the facts in *LaGrand* and *Avena* show that there may be room for this role nonetheless, without the need to revise the ICJ statute or the UN Charter.

7.3 NATIONAL COURTS AS DIRECT ENFORCERS OF ICJ DECISIONS

Traditionally, national courts have been the vehicle through which international treaties and customary international law which have not been independently incorporated into domestic statutes enter the domestic system.⁶²⁶ International judicial decisions have often been used as evidence of the content of customary international law and at times even - used as authoritative interpretations of international agreements.⁶²⁷ Very rarely in such cases is the authority of the international decision questioned.⁶²⁸ Thus international decisions hold great power and the influence of these international judicial bodies have infiltrated the domestic legal systems without complete control by the executive. This has been the state of affairs for at least 200 years.⁶²⁹

However, there has been a shift in the international milieu. More individuals are coming before domestic courts seeking to assert their internationally recognised

⁶²⁶ Slaughter 'Judicial Globalisation' (1999-2000) 40 *Va. J.Int'l L* 1103.

⁶²⁷ Paust ('Domestic Influence of International Court of Justice Decisions' (1997-1998) 26 *Demv. J.Int'l L. & Pol'y*. 792) shows that since the creation of the International Court, 42 cases in federal courts in the United States have applied 15 ICJ decisions or advisory opinions as evidence of international normative content.

⁶²⁸ Paust 1997-1998 *Demv. J.Int'l L. & Pol'y* 798.

⁶²⁹ *Ibid.*

rights. Even more so, some individuals are asserting rights on the basis of international decisions, as was the case in the trilogy of cases that are the subject of this paper. Thus it is no longer correct to say that private plaintiffs have no relationship to ICJ cases. With the increase of judicial bodies and tribunals in international law, there should be greater room for reciprocity between courts, more specifically domestic courts and supranational courts, but also between domestic courts and international courts.

7.3.1 Why national courts?

After the *Nicaragua*⁶³⁰ case in 1986, it became apparent that the enforcement procedures available to the ICJ are weak in comparison to those available at a municipal level. *LaGrand* has brought this issue into the limelight once again, after the U.S. failed to comply with the ICJ provisional measures order. National courts as enforcers of ICJ decisions is thus a topical issue because it is clear that there is a gap in this respect, and it is clear that this gap may be narrowed by the use of national courts as enforcers.

National courts would be a useful mechanism for improving the enforcement of ICJ decisions for a number of reasons. Firstly, an effective system of international adjudication ultimately depends on the degree of co-operation shown by organs with a more immediate control over assets of the parties.⁶³¹ In this respect national courts are evidently in a better position than the ICJ itself. The ICJ does not have a mechanism to seize the assets of a noncompliant state, or the authority to direct that it hand its assets over to a judgment creditor.⁶³² Domestic courts, however, have this authority and power.

⁶³⁰ In this case, the United States openly refused to respect the judgment of the ICJ. See judgment of 27 June 1986 (accessed at <http://www.icj-cij.org/icjwww/icasess/inus/inusframe.htm> on 15 September 2006). For further discussion of the case see C Schulte *Compliance with Decisions of the International Court of Justice* (2004) 184.

⁶³¹ Shreuer "The implementation of International Judicial decision by Domestic Courts" (1975) 24 I. C.L.Q. 153 at 159.

⁶³² O'Connell "The Prospects of Enforcing Monetary judgments of the International Court of Justice: A study of Nicaragua's judgment against the United States (1989-1990)" 30 *Va. J. Int'l L.* 901-902.

Secondly, national courts in conjunction with litigants can assume a role of policing national political branches if allowed to implement international decisions.⁶³³ Kumm⁶³⁴ shows that in liberal constitutional democracies, government institutions and bureaucracies generally tend to conform their behaviour to legal requirements as interpreted by national courts. He concludes that in the same way, enforcement of international law by national courts is likely to increase the probability of state compliance with international law.⁶³⁵

Finally, it is essential that national courts be considered as enforcers of international decisions because of the current legal context. The process of globalisation has brought about significant changes in international relations. International law problems now have their roots in the domestic arena and if international law is to make any impact, it must tackle these problems at this level. International law pervades areas traditionally reserved to domestic jurisdiction of states such as human rights, criminal law, trade, the abuse of natural resources, management and conservation of the environment and even cultural heritage.⁶³⁶ As a result, adjudication in these areas will require a complex blend of international and national legal norms.⁶³⁷ This naturally mandates the involvement of international and national legal institutions.

In short, the most compelling reason for using national courts to enforce ICJ decisions is that they will be most effective. Their legitimacy and authority at a municipal law level means they are better suited to enforce decisions than the Security Council, the ICJ, or other international institutions.

⁶³³ Kumm "International Law in National Courts: The international rule of Law and the Limits of the Internationalist Model" (2003-2004) 44 *Va. J. Int'l L.* 19 at 22.

⁶³⁴ *Ibid.*

⁶³⁵ Louis Henkin, *How Nations Behave* 2nd ed (1979) at 47, points out that as a general rule nations comply with international law, but the problem of non-compliance is widespread enough to grant a significant role to national courts.

⁶³⁶ Francioni "International Law as a Common Language for National Courts" (2001) 36 *Tex. Int'l L. J.* 587 at 588.

⁶³⁷ *Ibid.*

7.3.2 The potential role for national courts to be direct enforcers of ICJ decisions.

There can be little doubt that national courts would be useful mechanisms to enforce ICJ decisions. The potential for this role is great, but the likelihood of this role being officially recognised is uncertain. This research has made it clear that there is no absolute obligation on national courts to enforce ICJ decisions and where national courts do so, there are real challenges that must be faced. Whether a court will defer to the ICJ or not depends on the status of international law in domestic law.

7.3.2.1 The status of international law in domestic law

Chapter 1 discussed the theories of international law that attempt to describe the relationship between international law and national law. It was shown that a dualist state is unlikely to accept the direct enforcement of international decision by its courts, whereas a monist state would. Slyz⁶³⁸ points out that these theories no longer exist in their pure forms, which means that most nations fall somewhere in between monist and dualist. However, even where a state is traditionally described as dualist, there might still be room for development. For instance, even in a dualist nation like the United States there is room for international principles to influence domestic law without first passing through the Legislature. A self-executing treaty might be directly enforced by a national court without having to first be approved by the Legislature. This once again supports the point that a strictly academic perspective of the theories of international law is not as fruitful an endeavour as the study of the relationship between international law and domestic law through state practice. Consequently, treaty law is the obvious area through which national courts can play an active role in enforcing ICJ decisions. *LaGrand* was a demonstration of the outworking of this potential role.

⁶³⁸ Slyz "Note, International law in national courts" (1995-1996) 28 *N.Y.U.J. Int'l L. & Pol.* 65.

7.3.2.2 Practical Aspects

Reilley and Ordonez⁶³⁹ describe three scenarios to demonstrate the possible role for national courts in ICJ jurisprudence. Firstly, national courts may play a role where a successful litigant to an ICJ decision seeks to enforce that decision against the judgment debtor before a national court.⁶⁴⁰ Secondly, a national court may be approached by only one of the original parties to the ICJ decision.⁶⁴¹ Finally, a national court may be involved where a decision of the ICJ is used as evidence of law or fact in a matter before a national court.⁶⁴²

Judgment creditor and judgment debtor before a national court

This first scenario would arise as follows: suppose the ICJ in *LaGrand* had requested a monetary award as compensation for the breach by the United States, and Germany were to enforce this decision in a domestic court. Before a domestic judge could make ruling there are two conditions that he has to satisfy himself with. Firstly, he or she would have to accept the decision of the ICJ as authoritative and dispositive.⁶⁴³ If not, the United States could raise the issue of *res judicata* and argue that Germany cannot re-litigate on the basis of the same facts.⁶⁴⁴ Additionally, to hear the facts anew would be in contravention of Article 60 of the UN Charter that provides that ICJ decisions are final and without appeal.⁶⁴⁵ Yet a domestic judge may be hesitant to enforce the ICJ decision without hearing argument for fear that he would be acting outside his authority. No party has attempted to enforce an ICJ decision in this way; consequently, the outcome is certain. However, this remains an option, albeit an unlikely one.

⁶³⁹ Reilley & Ordonez "Effect of the Jurisprudence of the International Court of Justice on national courts" (1995-1996) 28 *N.Y.U.J. Int'l L. & Pol.* 435.

⁶⁴⁰ Reilley & Ordonez 1995-1996 28 *N.Y.U.J. Int'l L. & Pol.* 452.

⁶⁴¹ Reilley & Ordonez 1995-1996 28 *N.Y.U.J. Int'l L. & Pol.* 455.

⁶⁴² Reilley & Ordonez 1995-1996 28 *N.Y.U.J. Int'l L. & Pol.* 468.

⁶⁴³ Reilley & Ordonez 1995-1996 28 *N.Y.U.J. Int'l L. & Pol.* 452.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ Reilley & Ordonez 1995-1996 28 *N.Y.U.J. Int'l L. & Pol.* 455.

One party to the ICJ decision before a national court

This can happen in two instances; where a third party is suing the judgment debtor and relies on the ICJ decision as the basis of its claim, or the judgment creditor is suing a third party on the basis of the ICJ decision.⁶⁴⁶ If only one of the parties to the ICJ decision is the subject of litigation before the national court, the problem of *res judicata* does not strictly arise because the parties are not the same. An example of this can be seen in the *Anglo-Iranian Oil Case*.⁶⁴⁷ The case concerned the legitimacy of Iran's decision to nationalise oil. Although the matter was never dealt with on the merits for lack of jurisdiction, the Anglo-Iranian Oil Company, a British company, then brought an action against a Swiss company that had purchased a quantity of the nationalised oil at a national level.⁶⁴⁸ The ICJ did not deal with the case on the merits, but certain comments made by the court were later used as foundations for actions by the United Kingdom. In the case of *Socobel v Greece*⁶⁴⁹ a Belgian corporation sought to execute a judgment obtained 12 years earlier in the PCIJ, before a Belgian court. Whilst the action was not successful on the basis of jurisdiction, it demonstrates the potential that national courts have to actively enforce decisions of the ICJ. The problem here is that section says that ICJ decisions are binding only on the parties to the case.

ICJ decision used as evidence of law or fact in a domestic court

The final scenario is where domestic courts cite ICJ decisions as evidence of law or fact. In such cases the ICJ decision is often afforded persuasive authority. This occurs predominantly in the area of maritime law and treaty interpretation.⁶⁵⁰ In the case concerning *Rights of Nationals of the United States of America in Morocco (Fr v*

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *U.K. v Iran*, 1952 I.C.J 93 (July 22). Available at <http://www.icj-cij.org/icjwww/idecisions/isummaries/iukisummary520722.htm>.

⁶⁴⁸ *Anglo-Iranian Oil Co v Jaffrate et al* (Supreme Court of the Colony of Aden, 1953). Can be found in (1953) 47 *Am. J. Int'l L.* 325.

⁶⁴⁹ 18 I.L.R 3 (Belg, Trib. Civ. de Bruxelles 1951).

⁶⁵⁰ Reilley & Ordonnez 1995-1996 28 *N.Y.U.J. Int'l L. & Pol.* 469.

U.S.) a Moroccan Appeal court overturned a decision by the lower court which had been based on an earlier ICJ decision as its primary authority.

The *Medellin v Dretke*⁶⁵¹ -type situation is a unique example that could fall into either of the second or third categories. Medellin was relying on the ICJ's interpretation of the VCCR, while relying on the ICJ's finding in *Avena* that the detainees should be allowed.

7.3.3 Concluding remarks on national courts as active enforcers of ICJ decisions

At the time that the UN Charter was drafted it was not envisaged that international law would have domestic legal effect. However, it clearly does. The rights of individuals in the same position as Medellin cannot be disregarded. The law must be expanded to accommodate this situation. It therefore follows that only national courts would be able to adjudicate in such cases, since private individuals have no standing in the ICJ.

The above examples are an attempt to show three ways in which national courts could be active enforcers of ICJ decisions.

Political scientists have said that the ECJ was cautious in its approach, to avoid overstepping the bounds of political consensus of the community.⁶⁵² The court thus used an incremental style by wooing national courts to accept the expansion of its jurisdiction and enforce its judgments. Interestingly enough, the founding fathers of the Treaty of Rome never intended the ECJ to play such a prominent role in the European Community.⁶⁵³

⁶⁵¹ (125 S. Ct 686 (2004).

⁶⁵² Stein 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *Am. J. Int'l L.* 1.

⁶⁵³ See Rasmussen *On Law and Policy in the European Court of Justice* (1986) 249-250.

7.4 CHAPTER CONCLUSION

Globalisation and the human rights movement has resulted in significant changes in the international milieu. International law has not remained untouched by these changes. Due to the increased connectivity in the world, the domain of international law and domestic law can no longer be seen as separate. Decisions made at an international court level are now having more direct impact on domestic law. This thesis has used the cases of *LaGrand* and *Avena* to demonstrate this phenomenon. The increased influence of international law in the domestic arena means the ICJ has greater opportunity to shape the development and reception of international legal principles and standards within the borders of sovereign states. The issue therefore requires a twofold approach: On the one hand, the ICJ must make bolder decisions than in the past. “The image of the International Court of Justice as a sort of lemonade stand dispensing occasional decisions to sovereign passers-by is no longer apt.”⁶⁵⁴ On the other hand, the implementation methods of the court have to be strengthened. There has been a relatively high record of compliance with the judicial decisions of the ICJ, but the lack of power to secure such compliance is a huge problem for international adjudication.⁶⁵⁵ The thesis has thus considered the possibility of using national courts as active enforcers of ICJ decisions.

It has been said that “the objectives of international law and the stability of the international system itself depend critically on domestic choices previously left to the determination of national political processes”.⁶⁵⁶ The EU system has proved the success of this method. It is unlikely that the UN Charter and the ICJ Statute will change; it has been shown that there is great room for the ICJ to use national courts as enforcers, especially in the area of treaty law. The example of the U.S. was used to show that this can be done in a way that would be in keeping with the domestic laws and constitutional principles of the nation state. The challenge that remains is not

⁶⁵⁴ Nafziger “Political Dispute Resolution by the World Court, with reference to United States Courts (1997-1998)” 26 *Dev. J. Int’l L. & Pol’y* 775 at 785.

⁶⁵⁵ Shreuder 1975 *Int & Comp. L.Q.* 159.

⁶⁵⁶ Slaughter & White “The Future of International Law is Domestic (or The European Way of Law)” 2006 47 *Harv. Int’l L.J.* 327 at 328.

structural but ideological, especially in the present international milieu. Francioni⁶⁵⁷ puts it as follows:

“At a time when the traditional straitjacket notion of national sovereignty is being eroded by transnational economic forces, global communication and the increasingly vocal role of non-governmental organizations, it becomes essential that national courts adjust to this reality by re-defining the boundary of their judicial function.”

This thesis is thus a contribution to the field, in that it shows that there is room for national court involvement in the enforcement of international decisions, at least through treaty law. National judges now need to embrace the fact that they too have a role to play in the development of international law.⁶⁵⁸ The idea of law is to establish a set of rules and principles that guide human or state behaviour. These rules must be both standard and stable. The success of these laws, however, lies not in their mere existence, but in their implementation. Consequently, the success of international law is not determined by how elegantly it is framed, but how well it is implemented by the member states for which it exists.

⁶⁵⁷ 2001 *Tex. Int'l L. J.* 587 at 598.

⁶⁵⁸ Reilley & Ordonez “Effect of the Jurisprudence of the International Court of Justice on National Courts” (1995-1996) 28 *N.Y.U. J. Int'l L. & Pol.* 435 at 483.

ABBREVIATIONS

Alb. L. Rev	Albany Law Review
Am. J. Int'l L	American Journal of International Law
Am. Soc'y Int'l L. Proc	American Society of International Law Proceedings
Am. U. Int'l L. Rev	American University International Law Review
Berkeley J. Int'l L	Berkeley Journal of International Law
Brit. Y.B. Int'l L	British Yearbook of International law
Brook. J. Int'l L	Brooklyn Journal of International Law
Cal. L. Rev	California Law Review
Cardozo J. Int'l & Comp L	Cardozo Journal of International and Comparative Law
Cathoic. U. L. Rev	Cathoic University Law Review
Chi. J. Int'l L	Chicago Journal of International Law
Colum. J. Transnat'l L	Columbia Journal of Transnational Law
Denv. J. Int'l & Pol'y	Denver Journal of International Law and Policy
EJIL	European Journal of International Law
Emory Int'l L. Rev	Emory International Law Review
Emory. Int'l L. J	Emory International Law Journal
Ethics & Int'l Aff	Ethics and International Affairs
Fordham. L. Rev	Fordham Law Review
Harv. Int'l. L. J	Harvard International Law Journal
Hastings Int'l & Comp. L. Review	Hastings International and Comparative Law Review

Hum. Rts. Q	Human rights Quarterly
Ind. J. Global Legal Stud	Indiana Journal of Global Legal Studies
Int'l & Comp L.Q	International and Comparative Law Quarterly
Iowa L. Rev	Iowa Law Review
Kentucky LJ	Kentucky Law Journal
Legal Stud	Legal Studies
LJIL	Leiden Journal of International Law
Loy. L.A. Int'l & Comp. L.J	Loyola of Los Angeles International And Comparative Law Journal
Mich. J. Int'l L	Michigan Journal of International Law
MJIL	Melbourne Journal of International Law
Mod. L.R	Modern Law Review
Monash Univ L.R	Monash University Law Review
N. C. J. Int'l L & Com. Reg	North Carolina Journal of International and Commercial Regulation
N. Y. U. J. Int'l L & Pol	New York University Journal of International Law and Politics
Sri Lanka J. Int'l L	Sri Lanka Journal of International Law
Stan. J. Int'l L	Stanford Journal of International Law
Stan. L. Rev	Stanford Law Review
Tex. Int'l L. J	Texas International Law Journal
Va. J. Int'l .L	Virginia Journal of International Law
Wash. U. Global Stud. L. Rev	Washington University Global Studies Law Review
Yale. J. Int'l L	Yale Law Journal Of International Law
Yale L J	Yale Law Journal

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