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APPLICATION OF TREATIES AND THE DECISIONS OF INTERNATIONAL TRIBUNALS IN THE UNITED STATES AND FRANCE: REFLECTIONS ON RECENT PRACTICE

*Martin A. Rogoff**

I. INTRODUCTION

In recent years, with the growth of international treaty law and the increasing role of international tribunals, questions involving the application of conventional international law and the decisions of international tribunals by national courts have assumed great practical importance.¹ This is not only because such questions are arising with increasing frequency, but also because the way in which they are handled by domestic courts has a lot to do with the efficacy of international law. As a practical matter, the rules of conventional international law and the decisions of international tribunals, if applied or effectuated by domestic courts, may very well be determinative of the outcome of a dispute. More significantly domestic courts may be the only bodies that are realistically positioned to apply or effectuate international law or the decisions of international tribunals in specific cases.

As a legal matter, international law mandates that a state that has assumed an international legal obligation must act in conformity with that obligation.² As far as treaties are concerned, they must be performed in good faith,³ and a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."⁴ This means that a state must give effect to a legal obligation it has assumed by agreement with other states no matter what substantive domestic law might provide to the contrary or whether or not domestic institutional or procedural modalities exist to give effect to that obligation. If a state is unwilling or unable to fulfill an international obligation it has assumed, it incurs "international responsibility" for that "wrongful act."⁵ International law, however, does not prescribe *how* a state must give effect to an international legal obligation.⁶ How a state fulfills its international legal obligations is a matter for the state itself to determine.

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1. RONNY ABRAHAM, *DROIT INTERNATIONAL, DROIT COMMUNAUTAIRE ET DROIT FRANÇAIS* 14-15 (1989). Ronny Abraham has been a member of the International Court of Justice since February 15, 2005. Prior to joining the Court, M. Abraham served as Director of Legal Affairs of the Ministry of Foreign Affairs in which capacity he acted as legal advisor to the French Government in the areas of general international public law, European law, international human rights law, and the law of the sea. *See also* CONSEIL D'ÉTAT, *LA NORME INTERNATIONALE EN DROIT FRANÇAIS* 9-24 (2000).

2. *See* International Law Commission Draft Articles on State Responsibility, (2001) 1 Y.B. Int'l L. Comm'n, arts. 1-3, 12 (adopted by ILC at its fifty-third session (2001)).

3. Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

4. *Id.* art. 27.

5. International Law Commission Draft Articles on State Responsibility, *supra* note 2, art. 1.

6. 1 OPPENHEIM'S INTERNATIONAL LAW 82-86 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

Traditional international law was concerned primarily with the external behavior of states considered as unitary actors. For instance, it was generally accepted that only states could be subjects of international law and have rights and obligations deriving from it; and treaties dealt almost exclusively with a narrow range of interstate concerns of a political nature: peace treaties, treaties of alliance and friendship, neutrality treaties, and treaties settling territorial claims. Furthermore, international tribunals were accorded jurisdiction only over disputes between states.

Today, treaties and international agreements deal not only with matters concerning political relations between states, but also with human rights, social, cultural, economic, technical, legal, and administrative matters that directly impact individuals as well;⁷ and the jurisdiction of international tribunals now extends in some cases to individuals.⁸ As the rules of substantive international law and the decisions of international tribunals concern themselves more and more with matters that are internal to states, the quotidian operations of internal institutions are increasingly implicated. This results at times in the clash of core substantive and procedural values of domestic legal systems with contrary requirements of international law or the decisions of international tribunals. This is especially true with regard to the administration of justice and to a multitude of concerns that are now regarded as falling within the domain of human rights. France, for instance, has been a frequent litigant in the European Court of Human Rights (ECHR) in cases concerning the normal operations of its criminal justice system;⁹ and individual litigants in French courts seeking such things as social benefits or the right to remain in France have frequently relied on provisions of international agreements to which France is a party. The United States has been a respondent in three recent, high-profile cases in the International Court of Justice with respect to matters arising out of the ordinary operation of its criminal justice system,¹⁰ and aspects of two of those cases have reached the United States Supreme Court.¹¹ Although less frequently than

7. Martin A. Rogoff & Barbara E. Gauditz, *The Provisional Application of International Agreements*, 39 MAINE L. REV. 29, 30 (1987).

8. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, Nov. 4, 1950, 312 U.N.T.S. 221, amended by Protocol No. 3, Europ. T.S. 45, Protocol No. 5, Europ. T.S. 55, Protocol No. 8, Europ. T.S. 118, and Protocol No. 11, Europ. T.S. 155, (allowing the European Court of Human Rights to receive applications from "any person . . . claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention . . .").

9. See generally Catherine Dupré, *France*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000, at 313, 325-29 (Robert Blackburn & Jörg Polakiewicz eds. 2001); Joël Andriantsimbazovina & Laurent Sermet, *Jurisprudence administrative et Convention européenne des droits de l'homme*, 15 REVUE FRANCAISE DE DROIT ADMINISTRATIF [R.F.D.A.] 799 (July-Aug. 1999); see also Mitchel de S.-O.-l'E. Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995 (2005) (describing decisions of the European Court of Human Rights holding that certain important, highly-valued, and time-honored practices of French courts violate the fair trial guarantee of the European Convention on Human Rights and the reaction of French courts to those decisions).

10. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June 27); *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248 (Apr. 9).

11. *Medellín v. Dretke*, 544 U.S. 660 (2005); *Breard v. Greene*, 523 U.S. 371 (1998).

in France, litigants in American courts seek to rely at times on international agreements.¹²

Recent decisions of international courts and courts in the United States and in France highlight certain legal problems in the relationship between international law and domestic law and international courts and domestic courts. The decisions of the International Court of Justice in the *Avena and other Mexican Nationals* (Mexico v. United States) and the United States Supreme Court in *Medellin v. Dretke* pose directly the question of whether United States action contravenes a substantive rule of international law as well as a decision of the International Court of Justice. Similarly, the two decisions of the French Council of State in the *Mme Chevrol* case¹³ and the decision of the ECHR in *Chevrol v. France*¹⁴ raise similar issues regarding French compliance with substantive international obligations and the decision of an international tribunal. The questions faced by both French and American courts revolve around the degree to which conventional international law and the decisions of international tribunals may intrude into the normal operation of their domestic legal systems, systems that have been developed and refined to a large degree by the highest political and legal authorities in each nation, which have deep historical roots, and ones in which each nation takes enormous pride.

In many ways, despite their differences and disagreements, contemporary France and the United States are very much alike in ways that are relevant to their attitudes toward international law. France and the United States each see themselves as exceptional nations, having a national calling to better the condition of mankind.¹⁵

12. See, e.g., *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005) (habeas corpus petitioner arguing that the Geneva Convention Relative to the Treatment of Prisoners of War may be enforced in federal court); *Jogi v. Voges*, 425 F.3d 367, 370-71 (7th Cir. 2005) (action by Indian national for money damages under Alien Tort Statute against county law enforcement officials for failing to inform him of his right under Vienna Convention on Consular Relations to have his consulate informed of his arrest); *Nuru v. Gonzales*, 404 F.3d 1207, 1216 (9th Cir. 2005) (argument by Eritrean national that denial of his petition for asylum violates Convention Against Torture); *Oregon v. Sanchez-Llamas*, 108 P.3d 573, 575 (Or. 2005) (argument by Mexican national that evidence should be suppressed because arresting police violated his right of consular notification and communication as guaranteed by the Vienna Convention on Consular Relations); *United States v. Li*, 206 F.3d 56, 57 (1st Cir. 2000) (argument by Chinese nationals seeking to rely on violation of Vienna Convention on Consular Relations for suppression of evidence or dismissal of indictment); *Domingues v. Nevada*, 961 P.2d 1279, 1280 (Nev. 1998) (argument by Defendant that the imposition of the death penalty on one who committed a capital offense while under the age of eighteen violates the International Covenant on Civil and Political Rights).

13. *Mme Chevrol-Benkeddach*, CE Ass., Apr. 9, 1999, Rec. Lebon 115; *Mme Chevrol*, CE, Feb. 11, 2004, Rec. Lebon 67.

14. *Chevrol v. France*, 2003-III Eur. Ct. H.R. 159.

15. One of the persistent strands in American foreign policy and American thinking about international law is Wilsonian idealism. See FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 3-74 (1985). The French analogue is the notion of "*mission civilisatrice*," that France has a "civilizing" role to play in advancing throughout the world its enlightenment values. See Margaret A. Majumdar, *Exceptionalism and Universalism: The Uneasy Alliance in the French-speaking World*, in *THE FRENCH EXCEPTION* (Emmanuel Godin & Tony Chafer eds. 2005) at 16, 16-29. The "civilizing" role of France has recently become the subject of controversy in France following the enactment of a law which requires that "Academic programs should especially recognize the positive role of the French presence abroad, particularly in North Africa . . ." Law No. 2005-158 of Feb. 23, 2005, art. 4. See also *Histoire, mémoire, politique: la France troublée*, LE MONDE, Dec. 11, 2005, at 1; Patrick Roger, *Genèse d'un amendement*

Each nation regards its political and legal systems, and the values which these systems embody and effectuate, as uniquely enlightened and exemplary. Although there are significant differences, both France and the United States have created broadly consensual and open political and legal systems, which to a great degree institutionalize and operationalize benign and progressive political rule and foster and maintain social cohesion, economic prosperity, and social justice.¹⁶ Also, both France and the United States recognize in principle the necessity and desirability of international law and international institutions, have been leaders in their development, and conform their actions to their rules and procedures most of the time.

Recently, however, many nations, particularly France, have criticized the United States for its perceived disregard of the constraints imposed by the substantive rules of international law and by the procedures and decisions of international institutions as well as for its go-it-alone approach to problems that would seem to require international cooperation for their resolution.¹⁷ United States behavior is seen as the unjustified pursuit of the national interest and national values through the unilateral action of the world's only superpower. The United States often justifies its freedom to act by invoking the doctrine of state sovereignty—that it has the inherent right to act alone and unconstrained to protect its national security or to implement its core values.¹⁸ With respect to those rules of conventional international law and decisions of international tribunals that require enforcement within the American legal system, United States courts frequently do not apply them for a variety of doctrinal reasons, which in many cases may be viewed as masking judicial deference or timidity vis-à-vis the executive branch of government or an unwillingness to displace congressionally-mandated rules or to deviate from accepted legal precedent.¹⁹

contesté, LE MONDE, Dec. 13, 2005, at 3; John Tagliabue, *The French: Married to the Past, And Thinking of Divorce*, N.Y. TIMES, Dec. 11, 2005, Week in Review, at 7.

16. See generally Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21 (1997).

17. See generally PHILIP H. GORDON & JEREMY SHAPIRO, *ALLIES AT WAR: AMERICA, EUROPE, AND THE CRISIS OVER IRAQ* (2004).

18. See, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004) (arguing that America's commitment to "democratic constitutionalism" causes it to resist international law and international institutions which are "antidemocratic . . . by structure and design"). See also ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 10-11 (2003) (arguing that differing American and European perspectives regarding international law, international institutions, transnational negotiation, cooperation, and the exercise of power derive from the fact that "the United States is powerful, [and] it behaves as powerful nations do" while Europeans "see the world through the eyes of weaker powers"). *But cf.* ROBERT COOPER, *THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY* 168 (2004) ("Multilateralism . . . is more than a refuge of the weak. It embodies at a global level the ideas of democracy and community that all civilized states stand for on the domestic level."); Robert W. Tucker & David C. Hendrickson, *The Sources of American Legitimacy*, 83 FOREIGN AFF. 18 (2004) (arguing that "legitimacy arises from the conviction that state action proceeds within the ambit of law" and stating that "the idea that U.S. legitimacy was not based on law reflects profound amnesia").

19. See generally Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 EUR. J. INT'L L. 751 (2004) (arguing that at the base of the rejection by U.S. courts of the proper implementation of international law "lies the perception that the fundamental postulates of the domestic legal order, as enshrined in the Constitution, cannot be altered by a body of law which does not exclusively emanate from the national society body"); Ana Peyro Llopis, *La place du droit international dans la*

In France, too, courts sometimes refuse to apply provisions of international agreements.²⁰ They justify such refusal on a number of grounds: that the particular tribunal seized of the question does not possess the competence to apply international law,²¹ that the international agreement in question has not been properly ratified or approved,²² that the particular provisions involved do not produce direct effects,²³ that particular provisions conflict with constitutional provisions²⁴ or legislative acts,²⁵ that the other nation involved has not accorded the reciprocity required by the

jurisprudence récente de la Court Suprême des États-Unis, 109 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 609 (2005) (asserting that recent decisions of the Supreme Court demonstrate that the executive and legislative branches play a decisive role in the decision-making process). See also Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 559 (1996) (describing and analyzing a series of decisions by the United States Supreme Court where the Court interpreted narrowly the scope of international agreements to which the United States was a party to avoid their application by United States courts and arguing that the reason for and effect of such interpretation was to allow maximum freedom of action to United States political and legal institutions); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994) (maintaining that United States courts conform their interpretation of treaties to the wishes of the executive branch).

20. See generally PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 236-39 (7th ed. 2002) (characterizing the attitude of French judges toward the application of treaties as one of "timidity"). But see JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 199 (6th ed. 2004) (arguing that French tribunals are demonstrating "a growing openness and boldness with respect to international law"). In responding to a question regarding the general attitude of French judges toward the application of the rules of conventional international law, Emmanuel Decaux, Pierre Michel Eisemann, Valérie Goessel-Le Bihan, and Brigitte Stern remark:

[The French judge] does not hesitate to give full effect to the international conventional rules binding France. The absence of reticence when faced with conventional law is evidenced by the evolution of judicial and administrative jurisprudence with respect to the primacy of the international conventional norm over the law and with respect to interpretation. If, in the past, one could evoke a certain reserve, if not a certain "legal nationalism," on the part of the administrative judge in comparison with the attitude of the judicial judge, such criticism would no longer be accurate, taking into account the evolution of the jurisprudence of the Council of State since the end of the 1980s.

EMMANUEL DECAUX ET AL., *France, in L'INTÉGRATION DU DROIT INTERNATIONAL ET COMMUNAUTAIRE DANS L'ORDRE JURIDIQUE NATIONAL: ÉTUDE DE LA PRATIQUE EN EUROPE* 241, 265 (Pierre Michel Eisemann ed., 1996) (internal citations omitted) (my translation). For the most comprehensive treatment of French treaty law and practice in English, see Pierre Michel Eisemann & Raphaële Rivier, *National Treaty Law and Practice: France, in NATIONAL TREATY LAW AND PRACTICE* 253 (Duncan B. Hollis et al. eds., 2005), which also includes (in French) Guidelines of the Prime Minister Relating to Treaty Making. *Id.* at 280. See also CONSEIL D'ÉTAT, *LA NORME INTERNATIONALE EN DROIT FRANÇAIS*, *supra* note 1, at 127-31 (stressing the importance of administrative officials assuring the "quality of the negotiated norm," because that norm will become part of the internal legal order).

21. Loi sur interruption volontaire de grossesse, CC decision no. 74-54DC, Jan. 15, 1975, Rec. 19.

22. SARL du parc d'activités de Blotzheim et S.C.I. Haselaecker, CE Ass., Dec. 18, 1998, Rec. Lebon 483.

23. Préfet du Val de Marne v. Medjani, CE, Jan. 18, 2002, req. no. 214664.

24. Sarran, Levacher et autres, CE Ass., Oct. 30, 1998, Rec. Lebon 368; Fraisse, Cass. ass. plén., June 2, 2000, Bull. Civ. 2003.

25. Ministre de l'Économie, des Finances et de l'Industrie v. Société Schneider Electric, CE Ass., June 28, 2002, Rec. Lebon 234.

Constitution,²⁶ or by interpreting the provision in question by reference to French law.²⁷ French courts, too, on occasion, do not enforce decisions of international tribunals.²⁸

Problems arising from the application by domestic courts of substantive rules of international law and decisions of international tribunals are encountered much more frequently in France than in the United States because France has assumed many more international obligations in areas that are traditionally of domestic concern than has the United States and has agreed to submit important categories of such disputes to international tribunals. For instance, France is a member of the European Union (EU), whose treaties and legislation prescribe rules governing vast areas of domestic economic life. France is also a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which contains detailed rules relating to judicial process and the protection of various freedoms (freedom of expression, freedom of thought and religion, freedom of assembly and association) and rights (right to privacy and family life, right to marry), and a provision prohibiting discrimination on the basis of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."²⁹ France is also subject to the jurisdiction of the European Court of Justice (ECJ) and the ECHR for disputes involving EU or European Convention on Human Rights rules. In addition, France is a party, and the United States is not, to other important international human rights conventions, like the International Covenant on Economic, Social and Cultural Rights,³⁰ the Convention on the Rights of the Child,³¹ and the Convention on the Elimination of All Forms of Racial Discrimination Against Women.³² Moreover, even when both France and the United States are party to a particular international human

26. Rekhou, CE Ass., May 29, 1981, Rec. Lebon 220; Mme Chevrol-Benkeddach, CE Ass., Apr. 9, 1999, Rec. Lebon 115. The condition of reciprocity, however, is not applied in cases where it makes no sense to do so, e.g., where the particular convention itself excludes a reciprocity requirement, as does the European Convention for the Protection of Human Rights and Fundamental Freedoms. See Confédération nationale des associations familiales catholiques, CE Ass., Dec. 21, 1990, Rec. Lebon 368 [hereinafter CNAFC].

27. Kone, CE Ass., July 3, 1996, Rec. Lebon 255.

28. Mme Chevrol, CE, Feb. 11, 2004, Rec. Lebon 67; *Ministre de l'Économie et des Finances c. Sociétés Amibu*, CE, Nov. 24, 1997, req. no. 171929.

29. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221. French courts regard the provisions of the European Convention on Human Rights as directly applicable. See, e.g., *Bozkurt*, Cass. soc., Jan. 14, 1999, Bull. civ. 1999 v. No. 24 p. 17; *M.G.*, Cass. com., Apr. 28, 1998; *X*, Cass. Crim., May 18, 1998, Bull. crim. 2002, 459; *Maubleu*, CE, Feb. 14, 1996, Rec. Lebon.

30. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

31. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The United States, however, has ratified two Protocols to the Convention, the Optional Protocol on the Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. See Sean D. Murphy (ed.), *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 419, 443 (2003). See also Michael J. Dennis, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 AM. J. INT'L L. 789 (2000).

32. Convention on the Elimination of All Forms of Racial Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

rights convention, the provisions of that convention are more likely to be regarded as directly applicable by French courts than by American courts. That is the case, for example, with the International Covenant on Civil and Political Rights, which the United States Senate declared to be non-self-executing in its consent to ratification,³³ the Protocol Relating to the Status of Refugees,³⁴ and the Convention Against Torture.³⁵

As the normal operations of French courts have become more and more enmeshed with international law and international judicial tribunals, French judges have sought to develop procedures and doctrines for effectuating France's international obligations, while at the same time according due respect to the French constitutional order. As institutions created and empowered by the Constitution, or by laws enacted

33. "The Senate's advice and consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing" U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). See also *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), cert. denied 537 U.S. 1173 (2003); *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001), cert. denied, 533 U.S. 969 (2001); *Domingues v. State*, 961 P.2d 1279 (Nev. 1998). The French Council of State, however, considers certain provisions of the Covenant to be directly applicable in domestic proceedings. See, e.g., *M. Stéphane X*, CE, Oct. 24, 2005, req. no. 276685 (Article 10); *Association collectif contre l'handiphobie*, CE, Sept. 26, 2005, req. no. 248357 (Articles 7, 23, and 26); *M. Rachid X*, Apr. 28, 2003, req. no. 235309 (Articles 12 and 16); *Association Choisir la vie – Association pour l'objection de conscience à l'avortement*, CE, Sect., Apr. 25, 2001, req. no. 216521 (Article 6). France is also a party—and the United States is not—to the First Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, (Mar. 23, 1976), which gives the Human Rights Committee established by the Convention the authority to consider communications from individuals alleging violations of the Covenant.

The French Council of State, however, considers certain provisions of the Covenant to be directly applicable in domestic proceedings. See, e.g., *M. Stéphane X*, CE, Oct. 24, 2005, req. no. 276685 (Article 10); *Association collectif contre l'handiphobie*, CE, Sept. 26, 2005, req. no. 248357 (Articles 7, 23, and 26); *M. Rachid X*, Apr. 28, 2003, req. no. 235309 (Articles 12 and 16); *Association Choisir la vie—Association pour l'objection de conscience à l'avortement*, CE, Sect., Apr. 25, 2001, req. no. 216521 (Article 6).

34. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, G.A. Res. 429[V], 189 U.N.T.S. 137; United Nations Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, G.A. Res. 2198[XXI], 19 U.S.T. 6223, 606 U.N.T.S. 267; *Groupe d'information et de soutien des immigrés [G.I.S.T.I.]*, CE, Nov. 6, 2000, req. no. 204784 (holding that Article 24, which requires "[c]ontracting States . . . [to] accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of [certain matters pertaining to labor legislation and social security]," produces direct effects); *I.N.S. v. Stevic*, 467 U.S. 407 (1984) (noting that the Protocol was not intended to be self-executing); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991) (deciding that the Protocol was not intended to be self-executing and therefore does not have the "force of law"); *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 544 (6th Cir. 2003) (holding that the United Nations Protocol relating to the Status of Refugees is not self-executing and is therefore not judicially enforceable law in the United States).

35. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708; *Mme Elser*, CE, Nov. 7, 2001, req. no. 228817 (holding that Article 15 of the Convention Against Torture is directly applicable); *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 551 (6th Cir. 2003) (holding that the Convention Against Torture is not self-executing); see also *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 211-12 (3rd Cir. 2003) (noting that Article 3 of the Convention Against Torture was implemented by the Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231).

by Parliament pursuant to the Constitution, French courts must look to the Constitution for authorization to apply international law and for answers to particular questions involving its application. During the past decade and a half, French judges have become more aware of and more sensitive to the requirements of international law, and have made enormous progress in formulating constitutional doctrine that is both responsive to the need to fulfill France's international legal obligations, while at the same time doing so with constitutional legitimacy. This progression has not always been easy. With respect to certain matters, it has been slow, painful, and incomplete. This is especially the case where core institutional or substantive values are challenged by requirements stemming from France's international commitments.³⁶

Judges in the United States have not been confronted with the same challenges, as international law and the decisions of international tribunals do not loom large in their daily work. This perhaps explains why American law concerning the application of international law by domestic courts is confused, unsystematic, and ad hoc. There may be a certain semantic uniformity to the specific rationales advanced by American courts for particular decisions (e.g., whether or not to apply the provision of an international agreement or what rules should govern its interpretation), but there is no general agreement on governing principles. As its recent decision in *Medellin v. Dretke*³⁷ signifies, the Supreme Court does not feel compelled to articulate such principles or to resolve specific questions regarding the relationship of international law and the decisions of international institutions and United States law.

The question of the relationship between the international and domestic legal orders has long been one of great theoretical interest.³⁸ The traditional theoretical framework for describing and analyzing the relationship between international law and domestic law posits two types of relationships: monism, where international law and domestic law comprise one unitary system of law, and dualism, where international law and domestic law comprise two distinct legal orders. Monism, especially the version that regards international law as having priority over domestic law, expresses an internationalist, cooperative, world-community orientation, while dualism expresses a state-centered, state sovereignty perspective. It has been suggested that the monism-

36. See Lasser, *supra* note 9.

37. 544 U.S. 660 (2005). In its *Per Curiam* decision, the Court dismissed its writ of certiorari as improvidently granted. In so doing, it left the two questions presented to it unanswered: (1) whether a federal court is bound by a ruling of the International Court of Justice to reconsider certain claims raised under a treaty to which the United States was a party; and (2) whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation to the ICJ's judgment. The Supreme Court also passed up an opportunity to provide guidance with respect to the relationship of the decisions of international tribunals and domestic courts in *Breard v. Greene*, 523 U.S. 371 (1998).

38. See Patrick Daillier, *Monisme et dualisme: un débat dépassé?*, DROIT INTERNATIONAL ET DROITS INTERNES, DÉVELOPPEMENTS RÉCENTS 9 (1998); Serge Sur, *Progrès et limites de la réception du droit international en droit français*, DROIT INTERNATIONAL ET DROITS INTERNES, DÉVELOPPEMENTS RÉCENTS 227 (1998); see also Luigi Ferrari-Bravo, *International Law and Municipal Law: The Complementarity of Legal Systems*, THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW (R. St. J. MacDonald & Douglas Johnston eds. 1983); Edwin Borchard, *The Relation Between International Law and Municipal Law*, 27 VA. L. REV. 137 (1940); Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 341-67 (1992) (classifying states into "monist" and "dualist" categories to describe the application of treaties by their courts); H. Mosler, *L'application du droit international public par les tribunaux nationaux*, 91 RECUEIL DES COURS 619, 635-50 (1957).

dualism approach to the question of the relationship of international law to domestic law is no longer useful, since the reality of the matter, which is how national constitutions and the decisions of domestic courts deal in actual practice with the application of international law in domestic courts, can no longer be profitably described or analyzed within the monism-dualism conceptual framework.³⁹ Nevertheless, as advocated by Patrick Daillier and Serge Sur, two prominent French international legal scholars and co-authors of principal treatises on public international law,⁴⁰ conceptual clarity and coherence are important in order to articulate accurately the contemporary relationship between international and domestic legal orders,⁴¹ and to allow for the clarification of the political and legal values underlying different relational choices.⁴² In adopting a monist or dualist perspective, a legal system in effect selects the basic orientation of its courts to international norms and decisions. That orientation then serves as a guide to courts in establishing presumptions and default rules and providing a principled basis for directly applying or not applying international law or giving effect to the decisions of international tribunals. The monism-dualism dichotomy is best viewed not as descriptive of what courts do, but rather as prescriptive, what courts should do, or at least what their fundamental policy orientation ought to be. In this sense it is valuable, if not indispensable, to bringing coherence and direction to this area of the law and to providing principled guidance to judges as they grapple with specific cases.

This Article begins with a description of the *Medellin* litigation in the United States, with an emphasis on the domestic legal problems faced by U.S. courts in applying the substantive obligations of the United States under the Vienna Convention on Consular Relations and the decision of the International Court of Justice in the *Avena* case. Next, the Article describes the *Chevrol* litigation in France, emphasizing the domestic legal problems faced by French courts in applying relevant provisions of the Evian Accords of 1962 and the European Convention for the Protection of Human Rights and in giving effect to the decision of the ECHR in *Chevrol v. France*. More attention is devoted to the application of international law and the decisions of international tribunals in France, as American readers are likely to be less familiar with French law and practice in this area than they are with comparable areas of American law and practice. The Article concludes that French judges are making

39. ABRAHAM, *supra* note 1 (1989).

40. COMBACAU & SUR, *supra* note 20; DAILLIER & PELLET, *supra* note 20.

41. Daillier, *supra* note 38, at 10. According to ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 33 (1992), "The inclination to construct and then secure hierarchies of legal norms is a central focus of French legal consciousness." More generally, conceptual clarity itself is an important value for French legal thought, which has been strongly influenced by France's Cartesian tradition. The French Cartesian tradition prioritizes abstract thinking over empirical detail, and favors the presentation of solutions to problems as logical deductions from more fundamental principles. The French Cartesian tradition differs significantly from American pragmatism, which distrusts abstract thinking and prioritizes empirical evidence. American jurists prefer to reason and argue from concrete examples and actual outcomes in prior situations. Rogoff, *supra* note 16, at 27-28.

42. Sur, *supra* note 38, at 227-28. In his treatise, co-authored with Jean Combacau, Professor Sur describes French law in this area as "complicated, opaque, unpredictable, and often uncertain." COMBACAU & SUR, *supra* note 20, at 199; see also Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L.REV. 529 (1999) (employing monism and dualism as categories for analyzing the relationship between international law and U.S. domestic law).

good faith efforts to fulfill the international legal obligations assumed by their country, but that American judges have not grappled systematically with the problem. Furthermore, the recent trend in decisions reflects the concern of U.S. courts to protect American sovereignty at the expense of international commitments. The decision to honor international commitments, therefore, is left to the executive or to Congress, the political branches of government.

II. INTERNATIONAL LAW IN THE UNITED STATES: *AVENA* AND *MEDELLÍN*

The *Avena* and *Medellín* decisions, as well as the prior *Breard* and *LaGrand* matters, raise fundamental questions about the interrelation of international law and international courts and their national counterparts.⁴³ Viewed from the domestic perspective, the heart of the matter is whether questions involving the application of international law and the decisions of international tribunals are essentially legal matters, to be handled by courts according to pre-existing legal rules and principles, or are they essentially political questions, to be handled by the political branches of government through executive action, including diplomatic undertakings, or congressional legislation.⁴⁴ As indicated earlier in this Article, international law is, as a general rule, indifferent to how a nation complies with its international legal obligations. Its only obligation is to do so. Viewed again from the domestic perspective, non-compliance with international law, just like non-compliance with a contract in a private consensual transaction, is very often an option.⁴⁵ By authorizing domestic courts to apply international law and effectuate the decisions of international tribunals, a nation, in effect, relinquishes its option of non-compliance (with of course, the corresponding responsibility to answer in some way for its violation), and, to that extent, limits its freedom of action.

From the perspective of international law, however, it is accepted without question that international obligations, including obligations assumed by international agreement, must be honored. But when perceived political necessity or imperatives arising from its domestic legal order make that course of conduct impossible or difficult for a state, compliance may be partial, tardy, or not occur at all.⁴⁶ Given these

43. See Curtis Bradley et al., *Discussion, Medellín v. Dretke: Federalism and International Law*, COLUM. J. TRANSNAT'L L. 667, 678 (remarks of Professor Bradley).

44. See JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 17-65 (Robert Badinter & Stephen Breyer, eds. 2004) (presentation and remarks of Dieter Grimm, former Vice President, Constitutional Court of Germany, followed by their discussion, stressing the fact that "[t]he decision that conflict is better left to the judiciary for resolution is not made primarily in the judicial, but in the political sphere.").

45. From the perspective of international law, non-compliance with international law rules and principles that have attained the status of *jus cogens* should not be viewed as an option for a state, just like a party to a contract in a private consensual transaction does not have the option to violate mandatory rules imposed by legislation or judicial decision for public policy reasons.

46. See generally Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434 (2004); see also Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 331 (2001) (concluding that "[t]he United States is not really a persistent treaty violator and . . . the episodes in question [involving treaty violations] do not loom large in relation to the quantity of U.S. conventional obligations Moreover, we discern no trend in the pattern of disputes, despite the prominence to the problem given by some current episodes."). But see Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 458, 462 (1998) (noting the

realities, states must decide how firmly to cast their lot with international law and the decisions of international tribunals and how much discretion to preserve for themselves. Ideally, this should be done at the time each particular treaty or agreement is negotiated. Its provisions should express precisely the obligations assumed, arrangements should be put in place to provide authoritative interpretation in case of ambiguity, and the obligations assumed should be scrupulously honored later. But, for a variety of reasons, this happy state of affairs does not prevail in many consensual international relationships, especially in multilateral treaty regimes.⁴⁷ Different treaty regimes may lead to different levels of commitment of states to leave to domestic judicial authorities the application of treaty provisions or international decisions interpreting or applying that treaty. The parties to the Vienna Convention on Consular Relations, for instance, the international agreement involved in the *Avena* and *Medellin* cases, are “only loosely joined together.”⁴⁸ As of December 31, 2003, there were 165 parties to the Convention, representing countries with great diversity of legal and political cultures.⁴⁹ The Convention sets forth substantive rules governing consular relations and consular personnel, but it does not establish institutions or procedures for the monitoring, interpretation, or enforcement of those obligations. The Optional Protocol to the Convention does provide a mechanism for the interpretation and application of the Convention, but it has far fewer parties⁵⁰ and its dispute settlement provisions have been rarely invoked. This is a strong contrast to the tight interconnectedness of the state parties to the European Convention on Human Rights, which, as we shall see later in this Article, was involved in the *Mme Chevrol* case and figures prominently in the work of French courts that are asked to apply conventional international law and the decisions of international tribunals. Whereas French courts, French government officials, and the French public have become thoroughly acclimated to the frequent intrusions of European human rights law and decisions of the ECHR into their criminal justice system, U.S. courts, political leaders, and the general public lack similar experience with the Vienna Convention on Consular Relations and decisions of the International Court of Justice.⁵¹ Thus, when an emotional, high-profile, and controversial issue arises, like the imposition of the death penalty in *Breard*, *LaGrand*, and *Medellin*, American courts are not inclined to defer to an international tribunal applying an international agreement. This is especially so where the U.S. law in question (the substantive and procedural law

“prevalence of distaste for treaty commitments in Congress and other influential circles, including the media” and remarking that “[a] reputation for playing fast and loose with treaty commitments can only do harm to our capacity to be a leader in the post-Cold War world.”).

47. See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581 (2005) (describing the considerable variation in the form of international agreements and the substantive obligations they impose).

48. Vagts, *The United States and Its Treaties*, *supra* note 46, at 332.

49. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DECEMBER 2003, U.N. Doc. ST/LEG/SER.E/22, at 104-05 (2003).

50. As of December 31, 2003, there were forty-six parties to the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, *id.* at 115.

51. See Douglass Cassel, *International Remedies in National Criminal Cases: ICJ Judgment in Germany v. United States*, 15 LEIDEN J. INT’L L. 69, 69 (2002) (indicating that in deciding the *LaGrand* case on the merits, “the International Court of Justice . . . for the first time intervened definitively . . . in domestic criminal proceedings.”).

concerning the imposition of the death penalty, as well as the procedural default doctrine) has been painstakingly developed by the Supreme Court over a long period of time and involves important constitutional principles. Even in the close-knit EU and European human rights treaty regimes, national courts do not necessarily conform to the decisions of the ECJ or ECHR in all cases. It has become fashionable to talk about a “dialogue” between courts in this context. Perhaps it would better serve the cause of enhancing the long-term efficacy of international law in the United States to view the American reaction in the *Breard*, *LaGrand*, and *Avena-Medellín* cases in this light, rather than ignoring the real and bona fide difficulties of U.S. courts in effectuating these particular decisions of the ICJ.⁵²

A. Medellín v. Dretke

Medellín, a Mexican national, was convicted and sentenced to death by a Texas court for the rape and murder of two girls in 1993. His conviction was affirmed by the Texas Court for Criminal Appeals. After failing in a state habeas corpus action, in which he claimed for the first time that Texas failed to notify him of his right to consular access as required by the Vienna Convention on Consular Relations (VCCR), he filed a federal habeas corpus petition raising a claim under the VCCR that he had not been informed of his right to have the consular post of his state informed of his arrest. The District Court denied his petition. Medellín then applied to the Court of Appeals for the Fifth Circuit for a certificate of appealability. While his application was pending, the International Court of Justice handed down its decision in the *Avena* case in which Mexico had alleged that the United States had violated the VCCR with respect to Medellín and other Mexican nationals.⁵³ The ICJ decided that the rights

52. The United States has in fact taken a significant, positive step to respond to the *Avena* decision. In February 2005, President Bush sent a memorandum to the attorney general entitled “Compliance with the Decision of the International Court of Justice in *Avena*.” After alluding to the jurisdiction of the ICJ based on the Optional Protocol, the memorandum continues:

I have determined . . . that the United States will discharge its international obligations under the decision of the International Court of Justice in the [*Avena*] case . . . by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

John R. Crook (ed.), *Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT'L L. 479, 489-90 (2005). But see Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783, 784, 796 (2004) (asserting that “[t]he attitude of the United States towards international adjudication seems to have reached another low point” and pointing out that “[a]s long as international courts and tribunals regulate mutual and reciprocal relations among nation-states, they are accepted . . . as a necessary evil. But international institutions issuing rulings that are directly applicable to American citizens will remain anathema.”).

53. The jurisdiction of the ICJ in *Avena* was based on the Optional Protocol to the Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 326, 596 U.N.T.S. 488, to which the United States was a party. Following the *Avena* decision, in March 2005, the United States withdrew from the Protocol. According to a State Department spokesman, “[W]hen we signed up to the optional protocol, it [was] not anticipated that . . . the optional protocol would be used to review cases of domestic criminal law.” Crook, *supra* note 52, at 490.

Compare Press Release, International Court of Justice, Certain Criminal proceedings in France (Republic of the Congo v. France) (July 16, 2003). In December 2002, the Republic of the Congo filed an Application instituting proceedings against France seeking annulment of the investigations and prosecution measures taken by French authorities concerning crimes against humanity and torture allegedly committed

accorded by the VCCR were enforceable by individuals, that the United States had violated those rights, and that the United States must “provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals” to determine whether the violations “caused actual prejudice,” without allowing procedural default rules to bar such review.⁵⁴ The Court of Appeals denied Medellín’s application for a certificate of appealability, based on his procedural default and its prior holding that the VCCR did not create individually enforceable rights.⁵⁵ Subsequently, the Supreme Court granted certiorari to consider two questions: “[F]irst, whether a federal court is bound by the International Court of Justice’s (ICJ) ruling that United States courts must reconsider petitioner José Medellín’s claim for relief under the Vienna Convention on Consular Relations . . . without regard to procedural default doctrines; and second, whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ’s judgment.”⁵⁶

Later, based on the ICJ’s *Avena* judgment and a memorandum issued by President Bush that the United States would discharge its international obligations under the *Avena* judgment by “having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision,”⁵⁷ Medellín filed a state habeas corpus application. In a per curiam opinion, the Supreme Court dismissed the writ of certiorari as improvidently granted “[i]n light of the possibility that the Texas courts will provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President’s memorandum”⁵⁸

Justice O’Connor, joined by Justices Stevens, Souter, and Breyer, dissented. She maintained that there were three issues in the case that deserved to be addressed:

- (1) whether the [ICJ’s] judgment in Medellín’s favor . . . is binding on American courts;
- (2) whether Article 36(1)(b) of the [Vienna] Convention creates a judicially enforceable individual right; and
- (3) whether Article 36(2) of the Convention

in the Congo against individuals of Congolese nationality filed by human rights associations against high Congolese government officials. The Republic of the Congo based jurisdiction on Article 38(5) of the Rules of the Court, which provides:

When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court’s jurisdiction for the purposes of the case.

Rules of Court, 1978 I.C.J. art. 38(5). By letter dated April 8, 2003, France stated that it “consent[ed] to the jurisdiction of the Court to entertain the Application pursuant to Article 38, paragraph 5.” Press Release, International Court of Justice, Certain Criminal Proceedings in France (Republic of the Congo v. France) (July 16, 2003).

54. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 72 (Mar. 31).

55. *United States v. Jimenez-Nava*, 243 F.3d 192, 192-93 (5th Cir. 2001).

56. *Medellín v. Dretke*, 544 U.S. 560 (2005).

57. Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>; see Crook, *supra* note 52, at 481.

58. *Medellín v. Dretke*, 125 S.Ct. at 2092.

sometimes requires state procedural default rules to be set aside so that the treaty can be given "full effect."⁵⁹

She wanted to remand the case for resolution of these issues.⁶⁰ Each of these questions relates to a matter that is central to the application of international law by American courts. Taken together, along with the subsidiary questions they raise,⁶¹ their answers would go a long way to clarifying a body of law that is both unsettled and confusing⁶² and in many cases prevents the United States from fulfilling its treaty obligations or provides justification for its not doing so.⁶³ The Supreme Court will have a chance to clarify the law in this area during its current term. It has granted certiorari in three cases that present important questions concerning the relationship of conventional international law and internal American law and the legal effect of decisions of international tribunals in U.S. courts.⁶⁴

59. *Id.* at 2095 (O'Connor, J., dissenting).

60. *Id.*

61. *E.g.*, treaty interpretation issues (The ICJ held in the *LaGrand* case that Article 36 of the Vienna Convention created personal rights and that state procedural default rules cannot bar its effective application. *LaGrand Case* (Ger. v. U.S.), 2001 I.C.J. 466 (June 27). Are U.S. courts obligated to follow the ICJ's interpretation in applying that provision of the Convention? Should a U.S. court revisit its interpretation of a treaty when new international law appears?); hierarchy of norms issues (Do the requirements of Article 36 conflict with provisions of the later-enacted Antiterrorism and Effective Death Penalty Act, and if they do, which one, the treaty or the Act, governs? If a rule of international law, like the ICJ's interpretation of Article 36 of the Vienna Convention, conflicts with a doctrine of American law with constitutional status, like, say, the procedural default doctrine, which one governs?).

62. *See, e.g.*, Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995) (characterizing judicial response to questions relating to the application of treaty provisions by American courts as "doctrinal disarray and judicial confusion").

63. *See* Bianchi, *supra* note 19. Professor Louis Henkin, points out that the Supreme Court has not reexamined the doctrine that "the Constitution does not bar Congress from enacting laws inconsistent with the international obligations of the United States and that the courts will give effect to an act of Congress inconsistent with provisions in an earlier treaty" since its decision to that effect in the Chinese Exclusion Case, 130 U.S. 581 (1889), and "it has shown no disposition to do so." Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 854 (1987).

64. The first such case is *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3284 (U.S. Nov. 7, 2005) (No. 05-184) (including the following question presented: Can petitioner and others similarly situated obtain judicial enforcement from Article III court of rights protected under 1949 Geneva Convention in an action for writ of habeas corpus challenging legality of their detention by executive branch?). A federal District Court held that the relevant provision of the Third Geneva Convention was self-executing. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). Citing the Restatement § 111, the Court stated that "United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are 'non-self-executing.'" *Id.* at 164 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987)). The court thus begins its analysis with a presumption that treaties are self-executing. It then concludes:

Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.

Id. at 165. The Court of Appeals reversed. *Hamdan v. Rumsfeld*, 415 F.3d at 44.

B. International Court of Justice Decision in Avena

Legal consequences concerning the United States' non-compliance with its obligations under Article 36 of the VCCR have been considered by the International Court of Justice (ICJ) in three recent cases.⁶⁵ These cases have been thoroughly discussed in the legal literature,⁶⁶ and will not be rehashed here. Of particular significance, however, is that in these cases the ICJ is sitting in judgment on the conformity of a criminal proceeding in the United States to the requirements of an international agreement; even more significant, the ICJ, in effect, intervened in those proceedings to mandate that certain remedial measures be taken. Legal scholars in the United States and elsewhere have recently written much about the internationalization (or globalization) of adjudication⁶⁷ and the related phenomenon of dialogue between

The second such case is *Sanchez-Llamas v. Oregon*, 108 P.3d 573 (Or. 2005), *cert. granted*, 74 U.S.L.W. 3284 (U.S. Nov. 7, 2005) (No. 04-10566) (including the following question presented: (1) Does Vienna Convention [on Consular Relations] convey individual rights of consular notification and access to foreign detainee enforceable in courts of United States? (2) Does state's failure to notify foreign detainee of his rights under Vienna Convention result in suppression of his statements to police?).

The third such case is *Bustillo v. Johnson*, *cert. granted*, 74 U.S.L.W. 3284 (U.S. Nov. 7, 2005) (No. 05-51) (including the following question presented: May state courts, contrary to International Court of Justice's interpretation of Vienna Convention, . . . refuse to consider violations of Article 36 of that treaty because of procedural bar or because treaty does not create individually enforceable rights?).

65. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June 27); *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248 (Apr. 9).

66. For a discussion of *Avena*, see for example: Linda E. Carter, *Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals (Mex. v. U.S.)*, 25 MICH. J. INT'L L. 117 (2003); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically to the Supreme Court of the United States about the Fundamental Nature of the Right to Consul*, 36 GEO. J. INT'L L. 1 (2004); Dinah L. Shelton, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 98 AM. J. INT'L L. 559 (2004); Adrienne M. Tranel, *The Ruling of the International Court of Justice in Avena and Other Mexican Nationals: Enforcing the Right to Consular Assistance in U.S. Jurisprudence*, 20 AM. U. INT'L L. REV. 403 (2005); Reynaldo Anaya Valencia, Craig L. Jackson, Leticia Van de Putte, & Rodney Ellis, *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World*, 23 YALE L. & POL'Y REV. 455 (2005). For a discussion of the *LaGrand*, see for example: Stephanie Baker, *Germany v. United States in the International Court of Justice: An International Battle over the Interpretation of Article Thirty-six of the Vienna Convention on Consular Relations*, 30 GA. J. INT'L & COMP. L. 277 (2002); Cassel, *supra* note 51; Zsuzsanna Deen-Racsmány, *Diplomatic Protection and the LaGrand Case*, 15 LEIDEN J. INT'L L. 87 (2002); Matrigne, *infra* note 73; Orakhelashvili, *infra* note 73; Jennifer Lynne 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*, 17 AM. U. INT'L L. REV. 857 (2002). For a discussion of *Vienna Convention on Consular Relations (Para. V. U.S.)*, see for example: Christopher E. van der Waerden, Note, *Death and Diplomacy: Paraguay v. United States and the Vienna Convention on Consular Relations*, 45 WAYNE L. REV. 1631 (1999).

67. See, e.g., Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003) (describing "transnational litigation," a conceptual shift from two systems—international and national—to one, in which international and national judges apply international law, national law, or a mixture of both); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); see also Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004) (describing

courts.⁶⁸ Some American legal scholars have taken issue with the appropriateness, desirability, or the legality (under American law) of these developments.⁶⁹ Although it may be argued that the decisions of international tribunals applying international law in cases where they have jurisdiction to do so are necessarily binding on the state parties involved, even where those decisions conflict with domestic constitutional law, the reality of the matter is that international tribunals must tread extremely lightly in such situations. The jurisprudence of the European Court of Justice and that of the constitutional courts of certain EU member states provides ample and persuasive examples of this concern.⁷⁰

An important factor in a state's compliance with the decision of an international tribunal is that state's acceptance of the jurisdiction of the tribunal for that particular matter. Where jurisdiction is problematic, and is contested by the respondent state, compliance is unlikely.⁷¹ Moreover, the ICJ has, in the past, been concerned with establishing a solid jurisdictional base before adjudicating a case on the merits. In almost all the cases where it was not able to do so, it did not decide the case on the merits.⁷² Also significant is the remedy ordered by the tribunal. The *Avena* decision merits discussion on both counts.⁷³ Because, in the U.S. view, the jurisdiction of the

"dialectical review," which is a distinct pattern of judicial interaction between international tribunals and national courts which stands between the hierarchy of appellate review and the comity of judicial dialogue).

68. See, e.g., Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005); Tom Ginsburg, *Rounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005); Carl Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles*, 38 TEXAS INT'L L.J. 505 (2003); Francis G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems*, 38 TEXAS INT'L L.J. 547 (2003).

69. See, e.g., Bradley et al., *supra* note 43; Rubinfeld, *supra* note 18; Weisburd, *infra* note 110; Yoo, *Globalism and the Constitution*, *infra* note 113.

70. See, e.g., Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (*Solange I*), Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany, Second Seante] May 29, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 271 (F.R.G.); Re the Application of Wünsche Handelsgesellschaft (*Solange II*), BVerfG Oct. 22, 1986, 73 BVerfGE 339 (F.R.G.); Brunner and Others v. The European Union Treaty (Maastricht Judgment) BVerfG Oct. 12, 1993, 89 BVerfGE 155 (F.R.G.).

71. See, e.g., United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26).

72. See, e.g., Nuclear Tests (Austral. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); South West Africa (Eth. v. S. Afr.; Libe. v. S. Afr.), 1966 I.C.J. 6 (July 18); Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21); Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9 (July 6); Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6); see also Martin A. Rogoff, *International Politics and the Rule of Law: The United States and the International Court of Justice*, 7 B.U. INT'L L.J. 267 (1989) (stressing the importance of a firm jurisdictional basis for the efficacy of international adjudication).

73. The United States also raised objections to the jurisdiction of the Court in the *LaGrand* case. For good discussions of the jurisdictional issues in *LaGrand*, see Jean Matringe, *L'arrêt de la Cour internationale de Justice dans l'affaire LaGrand (Allemagne c. États-Unis d'Amérique) du 27 juin 2001*, 48 Annuaire Français de Droit International [A.F.D.I.] 215 (2002); Alexander Orakhelashvili, *Questions of International Judicial Jurisdiction in the LaGrand Case*, 15 LEIDEN J. INT'L L. 105 (2002); Carlo Santulli, *Une administration internationale de la justice nationale? à propos des affaires Breard et LaGrand*, 45 A.F.D.I. 101 (1999).

Court and the remedies requested are inextricably linked, they will be considered together.

The jurisdiction of the ICJ in *Avena* was based on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, which provides:

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.⁷⁴

The United States and Mexico were both parties to the Optional Protocol.

The United States objected to the Court's jurisdiction. With respect to the question of the treatment of Mexican nationals by its federal and state criminal justice systems, the United States contended that "Mexico is asking the Court to interpret and apply the treaty as if it were intended principally to govern the operation of a State's criminal justice system as it affects foreign nationals."⁷⁵ Also, the United States' jurisdictional objections extended to Mexico's submission concerning remedies: "The United States objects that . . . to require specific acts by the United States in its municipal criminal justice system would intrude deeply into the independence of its courts; and that for the Court to declare that the United States is under a specific obligation to vacate convictions and sentences would be beyond its jurisdiction."⁷⁶

The United States also raised several objections to the admissibility of Mexico's application, one of which asserted that Mexico, in effect, was asking the Court to act as "a court of criminal appeal," which the United States regarded as inappropriate.⁷⁷ Taken together, these objections to jurisdiction and admissibility, with their particular concern for the remedies requested, reflect the U.S. view that neither the Optional Protocol nor the VCCR itself authorized the Court to evaluate or intervene in domestic criminal proceedings. The United States had already recognized that it had violated Article 36. That should be the end of the matter at the international level—except for the obligation that the United States had thereby assumed, vis-à-vis Mexico, to make appropriate reparation for its violation. Whether any of the Mexican nationals involved in the *Avena* case had individual rights or remedies (for instance, if the treaty provision involved was self-executing and the particular legal consequences which would flow from that determination) was a matter to be decided according to U.S. law.

In rejecting the United States' objections to jurisdiction and admissibility in *Avena* and in its prior decision in *LaGrand*, the ICJ was breaking new ground. It was

74. Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, art. 1, Apr. 24, 1963, 596 U.N.T.S. 487.

75. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, ¶ 27 (Mar. 31).

76. *Id.* ¶ 32. Mexico submitted that it was

entitled to *restitutio in integrum* [and that] the United States therefore is under an obligation to restore the status quo ante, that is, reestablish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations

Id. ¶ 31.

77. *Id.* ¶ 36-37.

moving away from viewing its jurisdiction to interpret international agreements and to fashion remedies less from the traditional perspective of the consent of the parties, and more from the perspective of its responsibility as a judicial body to effectively resolve disputes that come before it.⁷⁸ By interpreting its authority more broadly, the Court was in effect increasing the obligations that states had reason to think they had assumed under the VCCR. While it is one thing to privilege the fashioning of an effective remedy over the principle of consent, and the state sovereignty and domestic jurisdiction principles to which it gives expression, it is quite another to assume that the state to which the decision is addressed will comply with that decision. If, on the other hand, the Court's activism is viewed as signaling to states that they must take their multilateral treaty obligations more seriously, including their responsibility to develop effective modalities to implement them in practice, its *Avena* decision, as well as the Court's prior decision in *LaGrand*, may be regarded as an important step forward in articulating the relationship between international and national legal orders.⁷⁹

C. The Procedural Default Doctrine

At the heart of the *Medellin* and *Avena* cases, and the *Breard* and *LaGrand* cases that preceded them, is the procedural default doctrine. The Supreme Court has formulated that doctrine in the following terms:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice We now recognize the important interest in finality served by state procedural rules, and the significant harm to States that results from the failure of federal courts to respect them.⁸⁰

78. Matringe, *supra* note 73 (arguing that the ICJ's decision in *LaGrand* in telling a state how it has to organize its internal judicial order so as to comply with its international legal obligations is based on a new view of the relationship between the internal and international legal orders); Orakhelashvili, *supra* note 73, at 129 ("*LaGrand* is a truly innovative step towards the understanding of the nature and scope of international judicial jurisdiction. In many respects this decision is at variance with what has been understood for decades to be the 'traditional' or 'dominant' view of jurisdiction. The Court's complex treatment of jurisdictional issues illustrates the irrelevance of the rigid adherence to the principle of consent as an absolute and non-derogable jurisdictional principle."); see also H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY passim* (Archon Books 1966) (1933) (a classic and enlightening discussion of the judicial function in international law).

79. See Cassel, *supra* note 51, at 85 ("The Judgment in *Germany v. U.S.* is important . . . for the ICJ's institutional credibility. . . . On the one hand, it refused to be cowed by exaggerated objections that it was being asked to intrude into domestic judicial administration in sensitive criminal matters; it properly answered that it was merely doing its job of interpreting and applying international law. . . . On the other hand, the Court went no further than justified by the facts of the case.").

80. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). For a comprehensive treatment of the procedural default doctrine, see 2 RANDY HERTZ & JAMES S. LEIBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 1133-1240 (4th ed. 2001 & Supp. 2004).

The centrality of the doctrine to the operation of the criminal justice system in the United States cannot be overstated. Most criminal proceedings occur in state courts. During the last fifty years, however, the Supreme Court has created a vast body of federal constitutional law giving defendants a variety of procedural rights that are applicable in state court proceedings. It is clear that it is the responsibility of state courts to assure that these federal rights are protected at trial, in appeals, and in post-conviction proceedings at the state level. But since constitutionally-based federal rights are involved, the ultimate responsibility to assure that they are vindicated falls to the federal courts. It is in this context of shared responsibility that the Supreme Court, with at times the involvement of Congress, has carefully crafted and fine-tuned the procedural default doctrine.

The use of federal habeas corpus by state prisoners has long been a sensitive issue.⁸¹ The Supreme Court has grappled with it repeatedly since the 1940s. At issue in habeas review of state court convictions is the degree to which the federal judiciary should intrude into the operations of state criminal justice systems. "In such cases, two significant interests come into conflict. The first is the interest in providing a federal forum for alleged violations of federal constitutional rights, and the second, in reinforcing the procedural integrity of the state judiciary."⁸² The procedural default doctrine, which seeks to accommodate these interests, has both a statutory basis⁸³ and constitutional underpinnings as well.⁸⁴ Justice Harlan has described the rule as having "roots far deeper than the statutes governing our jurisdiction . . . the rule is one of

81. CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 368 (6th ed. 2002).

Federal habeas corpus for state prisoners is, and always has been a controversial and emotion-ridden subject. In the 19th century there were protests against "the prostitution of the writ of habeas corpus, under which decisions of State courts are subject to the superintendence of the Federal judges . . ." As the scope of the writ has expanded, as the rights found to be protected by the Fourteenth Amendment have increased in number, so has the criticism of this jurisdiction mounted in volume. There is an affront to state sensibilities when a single federal judge can order discharge of a prisoner whose conviction has been affirmed by the highest court of a state.

Id.

In *Fay v. Noia*, 372 U.S. 391, 449 (1963) (Harlan, J. dissenting), a landmark case, Justice Harlan chastised the Court for "turn[ing] its back on history and [striking] a heavy blow at the foundations of our federal system."

82. Anne M. Voights, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1114 (1999); see also Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263 (1989).

83. 28 U.S.C. §§ 2254(a), (e)(2) (2000 & Supp. 2005).

84. See Kermit Roosevelt, III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888 (2003) ("The understanding that the incompatibility of advisory opinions with the jurisdiction granted by Article III underlies the . . . doctrine . . ."). Roosevelt cites *Herb v. Pitcairn*, where the Court stated:

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction.

324 U.S. 117, 125 (1945) (citations omitted). In *Herb*, petitioners were seeking to assert rights under a federal statute. *Id.* at 188.

constitutional dimensions going to the heart of the division of judicial powers in a federal system.”⁸⁵ That even federal constitutional rights can be defaulted, even in death penalty cases, is indicative of the importance of the procedural default doctrine in the American constitutional scheme.⁸⁶

In fact, over the course of the last forty years, the procedural default rule has become progressively stricter as a result of court decisions and legislative action. From its 1963 decision in *Fay v. Noia*, in which it significantly relaxed the procedural default doctrine, to the present, the Supreme Court substantially cut back the protections of federal habeas review of state court convictions, sensing that federal involvement in state criminal proceedings had gone too far.⁸⁷ Finally, in 1991, in *Coleman v. Thompson*, the Court finally overruled *Fay*, and adopted what is now the operative test.⁸⁸ The narrowing of habeas review because of procedural default from *Fay* in 1963 to *Coleman* in 1991 has been described by one commentator as representing a “changed understanding of habeas, which takes it not to be an independent action, but a review of state court decisions.”⁸⁹

Congress has also taken action to limit the availability of federal habeas review of state court convictions.⁹⁰ Most far-reaching was its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁹¹ which imposes new procedural limitations on federal habeas review and significantly limits the scope of such review.⁹² The AEDPA makes a number of important changes in the federal habeas corpus law. It establishes a one-year period of limitations for the filing of habeas corpus petitions;⁹³ under prior law, there was no limitation period for filing habeas petitions. Also, it establishes new, restrictive procedures for successive habeas petitions.⁹⁴ In addition, the AEDPA provides that if the state court has adjudicated the

85. *Fay v. Noia*, 372 U.S. at 464 (Harlan, J., dissenting).

86. *See, e.g.*, *Stewart v. LaGrand*, 526 U.S. 115 (1999); *Coleman v. Thompson*, 501 U.S. 722 (1991); *see generally* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986).

87. *See, e.g.*, *Henry v. Mississippi*, 379 U.S. 443 (1965) (defendant’s personal participation in the decision that led to the default was not required); *Davis v. United States*, 411 U.S. 233 (1973) (petitioner could have his habeas claim considered only if his failure to object was justified by “cause shown” and accompanied by a showing of “actual prejudice”); *Francis v. Henderson*, 425 U.S. 536 (1976) (extending *Davis* cause-and-prejudice test to state prisoner seeking review of grand jury discrimination); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (extending cause-and-prejudice test to trial errors); *see also* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* 1334-1345 (4th ed. 2004).

88. *Coleman v. Thompson*, 501 U.S. 722 (1991); *see infra* text accompanying note 94.

89. Roosevelt, *supra* note 84, at 1912.

90. States also have been active recently in limiting post-conviction remedies. *See generally* LARRY YACKLE, *POSTCONVICTION REMEDIES* 1-70 (1995 & Supp. 2005). Texas, for example, in 1995, made major changes to its death penalty process, significantly limiting postconviction remedies. Voigts, *supra* note 82 at 1113.

91. Pub. L. 104-132, 110 Stat. 1214 (1996). *See generally* HERTZ & LEIBMAN, *supra* note 80, at 109-215; *see also* James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411 (2001) (severely critical of the AEDPA); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 701 (2002) (stating that the AEDPA “was drafted, enacted, and signed in an atmosphere of anger and fear” as “Congress’s response to the tragedy of the Oklahoma City bombing”).

92. Voigts, *supra* note 82, at 1112.

93. 28 U.S.C. § 2244(d)(1).

94. 28 U.S.C. § 2244(b)(1).

merits of a federal claim and adequately explained its decision, the federal court may not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."⁹⁵ Finally, it raises the bar for a petitioner when it was his default that was responsible for the state court's failure to develop material facts.⁹⁶

Given the historic importance of the procedural default doctrine and recent judicial and legislative trends in its development,⁹⁷ it is really no surprise that the Supreme Court rejected petitioner's claim in *Breard* and elected not to consider the issue in *Medellin*.⁹⁸ While there were certainly a number of good legal justifications for staying *Breard*'s execution,⁹⁹ and, after the decision of the ICJ in the *LaGrand* case,¹⁰⁰ additional justifications for deciding that the procedural default doctrine was no bar to allowing full consideration of the Consular Convention issue in *Medellin*,¹⁰¹ the Supreme Court decided to stand by the doctrine when confronted with contrary requirements of international law.

95. 28 U.S.C. § 2254(d)(1); *see also* *Williams v. Taylor*, 529 U.S. 362, 376 (2000).

96. 28 U.S.C. §§ 2254(d)(2), (e).

97. The Supreme Court's recent federalism jurisprudence, with its tendency to favor increasing autonomy for states, may also be relevant in accounting for its decisions in *Breard* and *Medellin*. *See* Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 676 (1998) (arguing that "[i]n accordance with this conventional wisdom, commentators have tended to view the foreign relations concerns in the *Breard* case as an absolute value, and to ignore any competing federalism concerns," and calling attention to "Virginia's interests in enforcing its criminal laws and retaining control over its criminal justice system").

98. In *LaGrand*, the Supreme Court was never presented with the Consular Convention issue. However, the Court held that Walter LaGrand's challenge to the constitutionality of his execution by lethal gas, as violating the Eighth Amendment's prohibition of cruel and unusual punishment, had been procedurally defaulted by his failure to raise this claim in a timely fashion in state proceedings. *Stewart v. LaGrand*, 526 U.S. 115, 120 (1999); *LaGrand v. Stewart*, 173 F.3d 1144, 1148 (9th Cir. 1999).

99. *See, e.g.*, Jonathan I. Charney & W. Michael Reisman, *The Facts*, 92 AM. J. INT'L L. 666 (1998); Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679 (1998); Carlos Manuel Vásquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998); Jordan J. Paust, *Breard and Treaty-Based Rights under the Consular Convention*, 92 AM. J. INT'L L. 691 (1998); Frederic L. Kirgis, *Zschemig v. Miller and the Breard Matter*, 92 AM. J. INT'L L. 704 (1998); Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998).

100. On U.S. compliance obligations with respect to the ICJ's decision in *LaGrand*, *see* Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 444-48 (2004); Cara Drinan, *Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After LaGrand*, 54 STAN. L. REV. 1303 (2002); *Symposium: Reflections on the ICJ's LaGrand Decision*, 27 YALE J. INT'L L. 423 (2002).

101. Harry S. Clarke, III, *Determining the Remedy for Violations of Article 36 of the VCCR: Review and Reconsideration and the Clemency Process After Avena*, 38 GEO. WASH. INT'L L. REV. 131 (2006). On U.S. compliance with the *Avena* decision, *see*: Adrienne M. Tranel, Comment, *The Ruling of the International Court of Justice in Avena and Other Mexican Nationals: Enforcing the Right to Consular Assistance in U.S. Jurisprudence*, 20 AM U. INT'L L. REV. 403 (2005); Linda E. Carter, *Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration Under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals (Mex. v. U.S.)*, 25 MICH. J. INT'L L. 117 (2003).

D. International Law in U.S. Courts: Background and Views of Scholars

1. Background

The text of the U.S. Constitution seemingly adopts a monist orientation toward the place of conventional international law in the internal legal order.¹⁰² According to the Supremacy Clause:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties 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.¹⁰³

As is well known, one of the principal defects in the Articles of Confederation, which the Constitution sought to cure, was the inability of the federal government to insure that treaties of the United States would be honored by American courts and legislative bodies.¹⁰⁴ The Supremacy Clause accords treaties “law of the land”¹⁰⁵ status and requires state courts to apply them. As law of the land, they would of course also be applicable in federal courts. Moreover, in Federalist No. 64, John Jay writes that treaties are binding and “beyond the lawful reach of legislative acts.”¹⁰⁶ For Jay, then, treaties are constitutionally autonomous sources of law and in no way dependent on acts of Congress for their legal efficacy. Early decisions of the Supreme Court, like

102. The United States is usually classified as a “monist” state. *See, e.g.*, Buergethal, *supra* note 38, at 344-45.

103. U.S. CONST., art. VI, cl. 2. Professor Bradley argues that the Supremacy Clause is “*permissive* in nature—it permits the creation of self-executing federal law by treaty, but does not mandate this result.” Bradley, *supra* note 42, at 540. This reading would appear not to effectuate the primary purpose of including treaties along with “Laws” in the Clause, which was to assure that state courts give effect to U.S. treaty obligations (whether they had been incorporated into federal law or not). While Congress could certainly enact treaty obligations into law, and in that sense the Clause is permissive, the Clause cannot be read as requiring that result in order for a treaty provision to be applied by a state court.

104. THE FEDERALIST NO. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

105. It might be maintained that since the purpose of the Supremacy Clause was to provide for the supremacy of federal statutes and treaties over all state law it did not resolve questions pertaining to law at the federal level (such as the relative hierarchy of treaties and statutes *inter se* or whether treaties had to be affirmatively incorporated into domestic law or not). This reading, however, does not take into account the clear language of the Clause, which says that “Treaties . . . are the . . . Law of the Land” U.S. Const. art. VI. Professor Henkin concisely expresses the monist view of the Supremacy Clause in the following terms:

Article VI of the Constitution expressly provides for lawmaking by treaty: treaties are declared to be the supreme law of the land. The Framers intended that a treaty should become law *ipso facto*, which the treaty is made; it should not require legislative implementation to convert it into United States law. In effect, lawmaking by treaty was to be an alternative to legislation by Congress Surely, there is no evidence of any intent, by the Framers (or by John Marshall), to allow the President or the Senate, by their *ipse dixit*, to prevent a treaty that by its character *could* be law from becoming law of the land.

Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346-47 (1995).

106. THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed. 1961).

the *Charming Betsy* case,¹⁰⁷ indicated an openness to international law, as did the famous *Paquete Habana* decision of 1900.¹⁰⁸ Even the self-executing/non-self-executing treaty gloss on the Supremacy Clause by the Supreme Court in the 1829 *Foster v. Neilson* case was consistent with the monist view of the Constitution, as the Court in that case was simply seeking to apply the particular treaty provision involved according to its terms.¹⁰⁹ It is only more recently that U.S. courts have shown reluctance to approach the application of international law from a monist perspective; but clearly, the approach followed by U.S. courts today could be described as decidedly dualist.¹¹⁰ The constitutional text, therefore, whatever the original intent of its framers, as evidenced by its interpretation over time by U.S. courts, may be regarded as sufficiently flexible to allow for a variety of approaches to the interrelationship between international law and internal U.S. law. This is ultimately a matter for the Supreme Court to determine.

United States courts have historically shown an ambivalent commitment to the application of international law. Over time, as we have seen, the seemingly monist language of the Constitution has received a dualist gloss. There is still a minority view, however, expressed from time to time in lower court decisions and in dissenting opinions, that keeps the monist vision alive.¹¹¹ Most courts today now accept,

107. *Murray v. Schooner Charming Betsy*, 6 U.S. (1 Cranch) 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

108. 175 U.S. 677 (1900). “International 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.” *Id.* at 700.

109. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829) (holding that an article in a treaty between the United States and Spain, which stipulated that certain grants of land “shall be ratified and confirmed,” was not self-executing). This reading is supported by the Court’s later decision in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (holding that the article in question was self-executing after examining the Spanish text of the article). *See also* *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (“[The treaty] stands on the same footing of supremacy as do the provisions of the Constitution and the laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.”).

110. *See generally* Bradley, *supra* note 42; Bianchi, *supra* note 19; Llopis, *supra* note 19. *See also* A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT’L L. 877 (2000) (arguing that judgments of the International Court of Justice do not produce direct effects in American courts); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) (arguing that there are four distinct “doctrines” confounded in the self-executing treaty doctrine, which explain why a treaty may not be judicially enforceable). One American court has stated explicitly that “the United States’ rejection of a purely ‘monist’ view of the international and domestic legal orders shapes our analysis.” *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988). To the knowledge of the Author, based on a Westlaw search, this is the only reported American opinion, federal or state, in which any of the terms “monism,” “monist,” “dualism,” or “dualist” (in the sense employed in international legal theory) appear.

111. A recent decision by the Court of Appeals for the Seventh Circuit, *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005), provides a good example of the monist orientation. In *Jogi*, the petitioner, an Indian national, sought money damages under the Alien Tort Statute against county law enforcement officials for failing to inform him of his rights under the Vienna Convention of Consular Relations (VCCR). *Id.* at 369-70. The court viewed “the crux of the case” as involving a number of questions, including whether the VCCR is a self-executing treaty and, if so, whether it creates an individual right that can be enforced in court. *Id.* at 373. The *Jogi* court starts its analysis of the self-execution issue with section 111 of RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, thus presuming that the VCCR is self-

approve, and apply a dualist, nationalist approach to the application of international law in the internal American legal order, although judges have provided little in the way of reasoned justification for doing so. A substantial body of scholarly writing, nevertheless, justifies the dualist perspective on legal, historical, and policy grounds. At issue, it seems, in the internationalist-monist versus nationalist-dualist debate is not necessarily just the application of international law or the decisions of international tribunals in specific cases, but also the very principle itself of the hierarchy of norms and what that represents as a commitment to the international legal order. One writer has described the debate as a “‘rule-of-decision purism,’ referring to the shared fixation on the supremacy *vel non* of international principles”¹¹²

2. *Views of Scholars: From Public Policy to Political Theory to Legal Theory to Legal Doctrine*

While most American legal scholars approach questions of the application of international law and the decisions of international tribunals from a monist, or internationalist, perspective, there has emerged during the past ten years or so a substantial and influential body of legal scholarship advancing powerful and coherent arguments for the contrary point of view.¹¹³ Most judges have little familiarity with

executing. *Id.* at 376. It then focuses on the question of whether legislative action was necessary before the VCCR could be enforced. In considering this question it took into consideration the intent of the parties to the agreement as determined from “(1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; and (3) the nature of the particular obligation imposed by the part of the agreement under consideration” *Id.* at 377. The court then concluded that the provision at issue was self-executing. *Id.* at 378. The court then addressed the question of whether a private civil action may be based on the provision, which it regarded as separate from the question of self-execution. *Id.* at 378-79. Based on the purpose and negotiating history of Article 36, the court held that it could provide the basis for a private civil action. As for the appropriate remedies in a civil action based on the Convention, the court said that “[t]reaty-based claims are better analyzed in a manner analogous to claims under statutes: if there is an implied private right of action, the claimant can go forward; if not, he must rely [solely] on public enforcement measures to vindicate his rights.” *Id.* at 384. Significantly, the court discussed the International Court of Justice’s *LaGrand* and *Avena* decisions, and stated: “[W]e are of the opinion that the United States is bound by ICJ rulings in cases where it consented to the court’s jurisdiction, just as it would be bound by any arbitral procedure to which it consented” *Id.* Recognizing that this proposition may have been controversial, the court confined itself “to giving ‘the respectful consideration’ to the ICJ’s decisions in *LaGrand* and *Avena* that *Breard* calls for.” *Id.*

112. Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1109 (1990).

113. See generally Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFF. 9 (Nov./Dec. 2000) (describing the work of these writers and characterizing them as “the new sovereignists”). Examples of the genre are: JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*]; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism and the Constitution*]; Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857 (2005); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000). Some of these scholars have held important positions in government and have had significant influence on the development and articulation of policy. See Tim Golden, *Domestic Surveillance: The Advocate; A Junior Aide Had a Big*

international law and the legal materials necessary to ascertain and apply it,¹¹⁴ and are rarely called upon to determine the legal status of international law or the decisions of international tribunals within the body of legal principles they must apply. Therefore, it is no surprise that, as Professors Bradley and Goldsmith have observed, “judges tend to be heavily influenced by academic sources in this context.”¹¹⁵ This influence extends not only to ascertaining the content of the rules of customary international law, a somewhat arcane and specialized enterprise at best, but also to questions of domestic constitutional law pertaining to international law.¹¹⁶ In a series of articles and books, Professors Bradley and Goldsmith and other like-minded legal academics have challenged what Professor Bradley has called the “internationalist conception” of the relationship between international and domestic law.¹¹⁷ The purpose of this section is not to argue for or against either view of that relationship, but to explain the “nationalist” perspective and to situate it within its broader context of public policy, political and legal theory, and legal doctrine, since it provides a compelling and reasoned rationale for U.S. judges to accord less weight to international law.

It is important to recognize at the outset that the legal analysis offered by Professors Bradley and Goldsmith, whether intentional or not, is consistent for the most part with conservative policy preferences¹¹⁸ and with political theories that are generally supportive of those preferences.¹¹⁹ That the Supreme Court, the District of

Role In Terror Policy, N.Y. TIMES, Dec. 23, 2005, at A1 (describing the influence of John Yoo in his role as Deputy Assistant Attorney General in the Office of Legal Counsel of the United States Department of Justice from 2001-2003); Scott Shane, *Behind Power, One Principle*, N.Y. TIMES, Dec. 17, 2005, at A1 (describing the role of John Yoo and other administrative lawyers in developing arguments in support of the powers of the presidency).

114. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of The Modern Position*, 110 HARV. L. REV. 816, 875 (1997) (“[M]ost judges are not familiar with the materials relevant to the resolution of international law questions, such as compilations of treaties, statements by government representatives, and pronouncements of international and foreign tribunals.”). See also Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT’L & COMP. L. 205, 205 (1995-96).

115. Bradley & Goldsmith, *supra* note 114, at 875.

116. *Id.* at 875-76.

117. Bradley, *supra* note 42, at 531.

118. For representative statements of conservative policy preferences in the area of foreign affairs, see William Kristol & Robert Kagan, *Toward a Neo-Reaganite Foreign Policy*, 75 FOREIGN AFF. 18, 18, 20 (July/Aug. 1996) (setting forth “the outlines of a conservative view of the world and America’s proper role in it,” which they see as “[b]enevolent global hegemony”). See also John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 206 (2000) (arguing “as a convinced Americanist” against the “Globalist” agenda and its “harm and costs to the United States of belittling our popular sovereignty and constitutionalism, and restricting both our domestic and our international policy flexibility and power”). Bolton argues that Globalists are “a diverse collection of people generally uneasy with the dominance of capitalism as an economic philosophy and individualism as a political philosophy.” *Id.* at 205. Additionally, Bolton notes that “their agenda is unambiguously statist, but typically on a worldwide rather than a national level.” *Id.*

119. For a statement of a political theory supporting conservative policy preferences, see JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 16 (2005) (arguing that “American constitutional traditions make it hard for the United States to embrace schemes of global governance which find so much favor in other countries, particularly in western Europe”). See also GOLDSMITH & POSNER, *supra* note 113, at 7 (“Our theory of international law assumes

Columbia Circuit Court of Appeals, and all but three of the twelve other federal Circuit Courts of Appeals presently have majorities that have been appointed by conservative Republican presidents¹²⁰ would seem to suggest that legal doctrine justifying conservative policy outcomes would today find a receptive audience in American federal courts.

Fundamentally, nationalist legal theorists are wary of ceding decision-making power to officials who are not accountable to the American electorate in the way envisaged by their vision of the Constitution.¹²¹ To do so would not only conflict with American notions of popular sovereignty,¹²² but would also subvert federalism and separation of powers principles.¹²³ The solution to this problem, according to Professor Bradley, is to presume that decisions and actions of international tribunals are not self-executing, an “approach intuitively followed by U.S. courts in recent years” and increasingly mandated by treaty-makers and Congress.¹²⁴ Furthermore, “[a]s international institutions exercise increasing degrees of authority over matters that traditionally have been regulated by U.S. domestic law, these non-self-executing filters—whether imposed by the courts, the treaty-makers, or Congress—are likely to become even more common.”¹²⁵ Moreover, as explained by Professors Ruggie and Michelman, nationalists perceive a need “to safeguard the special features and protections of the U.S. Constitution from external interference”¹²⁶ and to preserve the integrity of American constitutional discourse.¹²⁷

that states act rationally to maximize their interests.”); JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* (1998). For a critique of what he calls “conservative idealism” and the support it provides for conservative policy preferences, see Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 *CHI. J. INT’L L.* 291 (2000). See also Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 147 (Michael Ignatieff ed., 2005).

120. See Warren Richey, *Conservatives Near Lock on U.S. Courts*, *CHRISTIAN SCIENCE MONITOR*, Apr. 14, 2005.

121. Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *STAN. L. REV.* 1557, 1558 (2003).

122. See Rubenfeld, *supra* note 18 (distinguishing between “democratic constitutionalism,” based on popular sovereignty, and “international constitutionalism,” whose purpose is to restrain democracy).

123. Bradley, *supra* note 121, at 1559. Separation of powers principles would be weakened because power would flow from Congress to the executive, as the principal voice of the United States in the international realm. *But see* David Golove, *The New Confederation: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *STAN. L. REV.* 1697 (2003) (criticizing the view that the Constitution contains an “exclusive national sovereignty” principle, which prohibits the delegation of power to officials not accountable to the American electorate).

124. Bradley, *supra* note 121, at 1560.

125. *Id.* at 1595. See also Paul W. Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 198, 198, 221 (Michael Ignatieff ed., 2005) (calling attention to the principal defining moments in the establishment of American political identity, the Revolution and the adoption of the Constitution, and the “absolute bedrock of the American political myth: the rule of law is the rule of the people” and maintaining that “[t]he United States will instinctively avoid application of [international] law to its own political order”).

126. John Gerard Ruggie, *American Exceptionalism, Exemptionalism, and Global Governance*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 304, 305 (Michael Ignatieff, ed., 2005).

127. Frank I. Michelman, *Integrity-Anxiety?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 241, 264-65 (Michael Ignatieff ed., 2005).

The persuasive power of the nationalist view derives principally from two interrelated sources: its grounding in political and constitutional theory, and its meticulous legal analysis of constitutional text,¹²⁸ original intent,¹²⁹ and relevant case law.¹³⁰ Theory and general principles provide rationales for their technical legal analysis, which in turn validates their theoretical assumptions.¹³¹ Although both prongs of their argument have been heavily criticized,¹³² the coherence of their theory is compelling, especially to judges with conservative orientations.

There is one comparative law point to note about the internationalist versus nationalist debate among American international law scholars. Each side rightly bases its analysis on the Constitution—its text, materials evidencing original intent, and its interpretation by the Supreme Court. Neither side raises the possibility that the Constitution might be amended to resolve the precise legal questions involved. Although that would be the best way to adapt an eighteenth century charter of government to the needs of a twenty-first century world, amendment is not a realistic possibility.¹³³ In France, however, the constitution has been amended several times to allow France to undertake certain international legal obligations that were not constitutionally permissible before amendment, most notably France's participation in the European Union.¹³⁴ Germany has also amended its constitution on occasion to allow for delegation of authority to the European Union and to be able to implement internally certain international obligations.¹³⁵ The principal amendment of this sort, Article 23, allows Germany to transfer sovereign powers to the European Union, but only to a "European Union which is committed to democratic, rule-of-law, social and federal principles as well as the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law."¹³⁶ Article 23 continues by defining in detail the role of the *Bundestag* (the lower house of parliament, which represents the people) and the *Bundesrat* (the upper house of parliament, which represents the federal states) in decisions relating to matters concerning the European Union.¹³⁷ Given the virtual impossibility of amending the U.S. Constitution, resolution of scholarly debate and judicial uncertainty regarding the constitutional principles concerning the place of international law in the domestic legal

128. See, e.g., Yoo, *Treaties and Public Lawmaking*, *supra* note 113.

129. See, e.g., Yoo, *Globalism and the Constitution*, *supra* note 113.

130. See, e.g., Bradley, *supra* note 42 (discussing *Breard v. Greene*).

131. See, e.g., GOLDSMITH & POSNER, *supra* note 113, *passim*.

132. See, e.g., Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vásquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

133. Cf. Dan Savage, *Can I Get a Little Privacy?*, N.Y. TIMES, Nov. 16, 2005, at A25 (recommending that those seeking to maintain the privacy rights developed by the Supreme Court in its case law beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965), should work for the adoption of a privacy amendment to the Constitution).

134. See *infra* note 145.

135. See Martin A. Rogoff, *The European Union, Germany, and the Länder: New Patterns of Political Relations in Europe*, 5 COLUM. J. EUR. L. 415, 421-22 (1999) (describing Article 23, a 1992 amendment of the Basic Law, which regulates a variety of aspects of the legal relations among Germany, its component states, and the European Union).

136. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Constitution] art. 23(1) (F.R.G.).

137. *Id.* at art. 23(2)-(6).

order will have to be resolved by the Supreme Court. The Supreme Court did not take advantage of the *Medellin v. Dretke* case to do so; perhaps it will do so now in *Hamdan* or in the two VCCR cases that are now pending before it.

III. INTERNATIONAL LAW IN FRANCE: *CHEVROL V. FRANCE* AND *MME CHEVROL*

French courts, like their American counterparts, struggle with the appropriate way to give effect to the international legal obligations of their nation. The Council of State's decision of February 11, 2004, in the *Chevrol* case,¹³⁸ following the decision of February 13, 2003, of the ECHR in *Chevrol v. France*,¹³⁹ and the Council of State's earlier decision of April 9, 1999,¹⁴⁰ which prompted Mme Chevrol's application to the European Commission of Human Rights, raises questions regarding the effectuation of conventional international law and the decisions of international tribunals in France.¹⁴¹ In spite of France's fundamental, constitutionally-based commitment to international law,¹⁴² French judges, like their American counterparts, view their relationship to international law through the lens of their domestic legal system. While French judges assume that treaties have the force of law and are obligatory,¹⁴³ they have traditionally approached their application with a certain "timidity."¹⁴⁴ That is changing, however, as French judges and lawyers become more and more familiar with taking into consideration and giving effect to rights accorded by European Union law,¹⁴⁵ and the European Convention on Human Rights.¹⁴⁶ Also, the interplay between

138. Mme Chevrol, CE, Feb. 11, 2004, Rec. Lebon 67.

139. *Chevrol v. France*, 2003-III Eur. Ct. H.R. 159.

140. Mme Chevrol-Benkeddach, CE, Apr. 9, 1999, Rec. Lebon 115.

141. *See also* Lemoine v. SNCF, Cass. soc., Sept. 30, 2005, Bull. civ. V (the Court of Cassation follows the position of the Council of State in refusing to reopen a civil matter after a decision against France by the European Court of Human Rights); Pierre-Yves Gautier, *De l'obligation pour le juge civil de réexaminer le procès après une condamnation par la CEDH*, RECUEIL DALLOZ, 2005, no. 40, at 2773.

142. The Preamble of the Constitution of 1946 provides:

Faithful to its traditions, the French Republic conforms to the rules of public international law. It will not wage any war of conquest and will never use its forces against the liberty of any people.

Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary for the organization and preservation of peace.

1946 Const. pmbl.; *France*, in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, 37-38 (RÜDIGER WOLFRUM & RAINER GROTE eds., 2005). The Preamble of the Constitution of 1946, along with the Declaration of Rights of Man and the Citizen of 1789, and the rights and obligations defined by the Charter of the Environment of 2004, have constitutional status by virtue of the Preamble of the Constitution of 1958. "The fundamental principles recognized by the laws of the Republic" also have constitutional status by virtue of their inclusion in the Preamble of the Constitution of 1946. *Liberté d'association*, CC decision no. 71-44DC, July 16, Rec. 29. With respect to the application of international law, Combacq and Sur describe the Constitution of 1958 as having monist potentialities (*virtualités monistes*). COMBACAU & SUR, *supra* note 20, at 184.

143. DAILLIER & PELLET, *supra* note 20, at 237.

144. *Id.* at 237.

145. The French Constitution contains special provisions governing France's participation in the European Union. Article 88-1, added in 1992, provides: "The Republic participates in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their competences in common." 1958 CONST. art. 88-1. Subsequently the Constitution was amended several times to enable France to ratify a number of EU

French courts on the one hand, and the European Court of Justice (ECJ) and the ECHR on the other, has played a major role in accustoming French courts to deal more confidently with questions regarding the application of international law.¹⁴⁷

Because of the special constitutional status of EU law in France,¹⁴⁸ the application of EU treaty provisions, as well as that of EU legislative, administrative, and judicial acts, raises questions different from those posed by the application of non-EU international conventional law or the decisions of non-EU international tribunals. Because of these differences, this Article will not deal with the application of EU law in France, except to the extent that it is relevant to questions concerning the application of non-EU international law and decisions.

Until the adoption of the Constitution of 1946, France could be described as adhering to the dualist view of the relationship between international law and domestic law.¹⁴⁹ Although the French Revolution had a strong universalist orientation, as evidenced by the Declaration of the Rights of Man and of the Citizen of 1789, it had even stronger nationalist tendencies.¹⁵⁰ And it was this nationalist orientation that governed legal thinking until after the Second World War. The Constitution of 1946 broke with the dualist tradition.¹⁵¹ Its Preamble stated: “Faithful to its traditions, the French Republic conforms to the rules of public international law (*droit public international*). It will not wage any war of conquest and will never use its forces against the liberty of any people.”¹⁵² Article 26 provides: “Diplomatic treaties, duly ratified and published, have the force of law, even in the case where they are contrary to French laws”¹⁵³ Article 28 provides: “The provisions of diplomatic treaties duly ratified and published having an authority superior to that of internal laws, can

treaties. In addition, Article 88-4 provides for parliamentary consideration of bills and proposals of community acts “involving provisions of a legislative nature.” 1958 CONST. art. 88-4. Furthermore, “resolutions may be voted on . . . on the drafts, proposals or documents.” *Id.*

146. European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 11, *opened for signature* May 11, 1994, E.T.S. No. 155. The original convention, E.T.S. 5, was signed at Rome on November 4, 1950, entered into force on September 3, 1953, and entered into force for France on May 3, 1974.

147. French writers have characterized these developments as producing a “changing legal environment,” Joël Andriantsimbazovina, *La réouverture d’une instance juridictionnelle administrative après condamnation de la France par la Cour européenne des droits de l’homme*, R.F.D.A. 163, 164 (Jan.-Feb. 2005), and “a European system of courts,” H. Gaudin, *Chronique de jurisprudence communautaire, Année 2003*, REVUE DU DROIT PUBLIC 1395 (2004).

148. “[T]he [European] community legal order [is] integrated into the internal legal order and [is] distinct from the international legal order.” *Traité établissant une Constitution pour l’Europe*, CC, decision no. 2004-505DC, Nov. 19, Rec. 173, at para. 10 (my translation).

149. See ABDELKHALEQ BERRAMDANE, *LA HIÉRARCHIE DES DROITS: DROITS INTERNES ET DROITS EUROPÉEN ET INTERNATIONAL* 123-30 (2002).

150. See René-Jean Dupuy, *La révolution française et le droit international actuel*, 214 RECEUIL DES COURS 9 (1989).

151. BERRAMDANE, *supra* note 149, at 125.

152. 1946 CONST. pmbi. Professor Berramdane points out that the change in position of the adjective “international” from the classic locution “*droit international public*” signifies that public law (“*droit public*”) is thus conceived as a whole, of which international law (“*droit international*”) constitutes only one branch. He regards this wording as “a profession of monist faith” and as “an adhesion to a unitary vision of international society.” BERRAMDANE, *supra* note 149, at 125.

153. 1946 CONST. 26.

only be abrogated, modified, or suspended after an official denunciation, notified through diplomatic channels.”¹⁵⁴ Article 27 provides that certain categories of treaties be ratified by a law.¹⁵⁵

The present Constitution, the Constitution of 1958, however, is less clear regarding the relationship between international law and internal French law, although it is usually classified in the monist category.¹⁵⁶ For instance, it is less imperative and detailed than the 1946 Constitution concerning the status of treaties and international agreements in the internal legal order, and it specifically subjects the supremacy of a treaty or international agreement to its publication and to its application by the other party.¹⁵⁷ This somewhat weaker constitutional commitment to the primacy of conventional international law in the French legal order resulted from a compromise between the nationalist vision of General de Gaulle and Michel Debré and the internationalist approach of political leaders of the Fourth Republic.¹⁵⁸ As a result of this compromise, the relevant constitutional provisions are susceptible to different readings. This lack of precision has allowed courts flexibility to work out arrangements in practice that may vary from internationalist (monist) to nationalist (dualist) depending on the particular judicial policy the court chooses to adopt.¹⁵⁹ As will be described later in this Article, French tribunals have made extensive use of this flexibility to develop rules and procedures for the application of international law in France in a manner consistent with French constitutional doctrine, as well as with France's international obligations. It is significant, however, that most French legal scholars, and perhaps more importantly key participants in the judicial process, regard the Constitution as fundamentally monist, and in evaluating judicial decisions (both the outcome of cases and the court's reasoning) and recommending solutions to legal problems (again, considering both outcomes and legal rationales), they adopt a monist perspective.¹⁶⁰ This general acceptance of a monist foundation for orienting and channeling legal reasoning and for interpreting relevant constitutional provisions should not be discounted as French tribunals strive to integrate international law into

154. *Id.* art. 28.

155. *Id.* art. 27.

156. Buergenthal, *supra* note 38, at 346-48.

157. 1958 CONST. 55.

158. BERRAMDANE, *supra* note 149, at 128-29.

159. See generally Vincent Kronenberger, *A New Approach to the Interpretation of the French Constitution in Respect to International Conventions: From Hierarchy of Norms to Conflict of Competence*, 47 NETH. INT'L L. REV. 323 (2000) (characterizing certain recent decisions of French tribunals as “dualist”).

160. See, e.g., the Conclusions of Ronny Abraham, *Commissaire du Gouvernement*, in the important *G.I.S.T.I. (1997)* case:

It seems to us that one can affirm that in French law, since *the adhesion of our legal system to the monist principle by virtue of Article 26 of the Constitution of October 27, 1946, confirmed by Article 55 of the Constitution of 1958*, international treaties, incorporated into the national legal order by the effect of their ratification and the publication in the *Journal Officiel*, are generally presumed to produce direct effects in internal law”

Ronny Abraham, *Les effets juridiques, en droit interne, de la Convention de New York relative aux droits de l'enfant, Conclusions sur Conseil d'État, Section, 23 avril 1997, Groupe d'information et de soutien des travailleurs immigrés (GIDTI)* (sic), 13 R.F.D.A. 585, 589 (May-June 1997) (emphasis added) (my translation).

the internal legal order in a way consistent with France's international obligations and the growing necessity to implement those obligations as part of the routine work of French courts.

A. *The Chevrol Decisions*

In February 1987, Mme Yamina Chevrol, a French national who held a diploma in medicine from the University of Algiers, applied to the Bouche-du-Rhône *département* council of the *Ordre des médecins* (Medical Association) for registration as a member of the *Ordre*, which was a condition for the practice of medicine.¹⁶¹ Her application was refused on the ground that she lacked the necessary educational credentials.¹⁶² She later made eleven unsuccessful applications to the Ministry of Health under a special exemptive provision of the Public Health Code.¹⁶³ In June 1995, she again applied to the *département* council, this time relying on a provision contained in the Government Declarations of March 19, 1962 on Algeria (Evian Accords), which provided that “[a]cademic diplomas and qualifications obtained in Algeria and France under the same conditions as regards curriculum, attendance and examinations shall be automatically valid in both countries.”¹⁶⁴ Her application was again rejected, and that rejection was affirmed by councils of the *Ordre des médecins* at the regional and national levels.¹⁶⁵ In June 1996, she appealed the decision of the national council to the Council of State.¹⁶⁶ She petitioned the Council of State to annul the decision of the national council of the *Ordre des médecins* and to order it to pay her the sum of 18,090 euros.¹⁶⁷

The Council of State rejected her appeal and her petition for damages.¹⁶⁸ The Council held that Mme Chevrol could not rely on the Evian Accords because Algeria did not accord reciprocity to holders of French diplomas.¹⁶⁹ According to Article 55 of the French Constitution of 1958, “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.”¹⁷⁰ In order to determine whether or not Algeria accorded reciprocity to the holders of French medical diplomas, the Council of State referred that question to the Legal Affairs Department

161. The description of the Mme Chevrol case is taken from the opinion of the European Court of Human Rights in *Chevrol v. France*, 2003-III Eur. Ct. H.R. 159. The decisions of French tribunals contain only the most cursory references to the facts. For a useful discussion of French judicial opinions, see generally Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81 (1994).

162. *Chevrol v. France*, 2003-III Eur. Ct. H.R. 159.

163. *Id.*

164. *Id.* The Declaration on Cultural Cooperation, Government Declarations of March 19, 1962 on Algeria (Evian Accords) was entered into force on July 3, 1962. The Government Declarations were approved in a referendum held on April 8, 1962, and were subsequently published in the *Journal officiel* on April 20, 1962.

165. *Chevrol v. France*, 2003-III Eur. Ct. H.R. 159.

166. *Id.*

167. *Mme Chevrol-Benkeddach*, CE Ass., Apr. 9, 1999, Rec. Lebon 115.

168. *Id.*

169. *Id.*

170. 1958 CONST. art. 55.

of the Ministry of Foreign Affairs.¹⁷¹ The Ministry of Foreign Affairs replied to the Council of State's reference by stating, in part, that

the reciprocity requirement of Article 55 of the Constitution cannot be regarded as having been satisfied [at the relevant time], since those provisions had not been applied by Algerian authorities in respect of applications by French nationals with qualifications obtained in France. Consequently, they cannot be applied to the facts of the present case.¹⁷²

In spite of Mme Chevrol's introduction of evidence to the contrary regarding application of the relevant provision of the Evian Accords by Algeria, the Council of State dismissed her application based solely on the statement of the Ministry of Foreign Affairs, regarding itself as bound by the Ministry's determination.¹⁷³ In so deciding, the Council of State was following its earlier decision in the *Rekhou* case,¹⁷⁴ even though the *Commissaire du Gouvernement* had recommended that the Council of State reconsider that decision.¹⁷⁵ The *Commissaire du Gouvernement* proposed that the Council of State presume that the reciprocity requirement is satisfied unless the Ministry of Foreign Affairs had indicated, in a notification previously published in the *Journal officiel*,¹⁷⁶ that the treaty in question had been suspended or denounced.¹⁷⁷ In his view, this approach would minimize problems posed by the requirement of Article 6(1) of the European Convention for the Protection of Human Rights, which guarantees "a fair and public hearing . . . by an independent and impartial tribunal established by law."¹⁷⁸ Also, doing away with the case-by-case reference to the Ministry of Foreign Affairs would accord with the spirit of the Council of State's 1990 decision in the *G.I.S.T.I.* case, in which the Council decided to cease its prior

171. Mme Chevrol-Benkeddach, CE Ass., Apr. 9, 1999, Rec. Lebon 115.

172. *Id.* (my translation).

173. *Id.* "It is not for the administrative courts to determine whether and to what extent the manner in which a treaty or agreement is applied by the other party is capable of depriving the instrument's provisions of the authority conferred on them by the Constitution." *Id.*

174. *Rekhou*, CE Ass., May 29, 1981, Rec. Lebon 220.

175. See Jean-François Lachaume, *Jurisprudence française relative au droit international (année 1999)*, 45 A.F.D.I. 710, 717 (2000). The *Commissaire du Gouvernement* is a government official responsible for recommending how a matter before an administrative tribunal should be resolved. He acts independently of the parties and his recommendations are based on his impartial view of the law. His written submissions are called *conclusions*. See CHRISTOPHE GUETTIER, *DROIT ADMINISTRATIF* 44-46 (1998). The conclusions of the *Commissaire du Gouvernement* are his own personal property, to do with as he wants. Sometimes they are published with the decision of the Council of State to which they relate; sometimes they are published in a legal periodical. Pursuant to a recent decree, no. 2005-1397, Nov. 10, 2005, non-published *conclusions* can be obtained on request to the court. For a description of the role of the *Commissaire du Gouvernement* in cases before the Council of State, see *Kress v. France*, 2000-VI Eur. Ct. H.R. 41, 54-57.

176. The *Journal officiel* is a government publication whose "Lois et décrets" edition includes laws, decrees, and other legal acts, including treaties and agreements. The legal effect of a law or other legal act dates from its publication. C. CIV., art. 1. See also LEXIQUE DES TERMES JURIDUQUES 356 (Serge Guinchard & Gabriel Montagnier eds., 15th ed. 2005).

177. The presumption recommended by the *Commissaire du Gouvernement* would result in an approach to the question of reciprocity similar to that prescribed by Article 28 of the Constitution of 1946, except that according to Article 28, the denunciation of treaties that required parliamentary approval (except for commercial treaties) also had to be done by parliament. 1946 CONST. art. 28.

178. Lachaume, *supra* note 175, at 717-18.

practice of referring treaty interpretation questions to the Ministry of Foreign Affairs for its opinion and considering itself bound by the Ministry's interpretation.¹⁷⁹

In March 1996 Mme Chevrol filed an application against France with the European Commission of Human Rights.¹⁸⁰ Her application was transferred to the ECHR on November 1, 1998, when Protocol No. 11 to the European Convention entered into force.¹⁸¹ She alleged that

the Council of State's referral to the Minister for Foreign Affairs of a preliminary question as to whether the condition of reciprocity had been satisfied in respect of [the Evian Accords] and the fact that the Minister's assessment was binding on the court and was not open to challenge by applicants amounted to interference by the executive which was incompatible with the notion of an independent "tribunal" with full jurisdiction as guaranteed by Article 6 § 1 of the Convention.¹⁸²

On February 13, 2003, the ECHR rendered its decision in which it held that France had violated Article 6(1) of the Convention in that applicant's case was not heard by a "tribunal" having full jurisdiction; France was ordered to pay applicant 17,000 euros in respect of non-pecuniary damages.¹⁸³

In June 2003, Mme Chevrol petitioned the Council of State to reexamine its decision of April 9, 1999. In rejecting her petition, the Council of State said:

Considering that there arises from no provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular from its Article 46, nor from any provision of internal law, that the decision of February 13, 2003 by which the European Court of Human Rights condemned France might have for effect the reopening of the judicial procedure which has been terminated by the decision of the Council of State of April 9, 1999, and at the conclusion of which Mme X seized the European Court of Human Rights, that the application of Mme X must be rejected.¹⁸⁴

179. *Id.* at 718; Groupe d'information et de soutien des travailleurs immigrés (G.I.S.T.I.), CE Ass., June 29, 1990, Rec. Lebon 171. In his *Conclusions* in G.I.S.T.I., the *Commissaire du Gouvernement*, Ronny Abraham, expressed his view that if the Council of State abandoned its practice of deferring to the Ministry of Foreign Affairs for questions of treaty interpretation, it should also reconsider, in the appropriate case, its *Rekhou* jurisprudence regarding the determination of reciprocal application. M. Abraham, *Conclusions de M. Abraham, Commissaire du Gouvernement*, 94 R.G.D.I.P. 882, 905 (1990).

180. *Chevrol v. France*, 2003-III Eur. Ct. H.R. 159.

181. *Id.*

182. *Id.* (my translation). Mme Chevrol was registered by the *Ordre des médecins* three days after the rejection of her petition by the Council of State in 1999. *Id.* She nevertheless filed a petition with the European Commission of Human Rights in order to obtain damages for the past period during which she was denied registration. *Id.*

183. *Id.* See also *Beaumartin v. France*, 19 Eur. Ct. H.R. Rep. 485 (1994). The decision of the European Court of Human Rights in *Chevrol v. France* came as no surprise; it was seen as the logical consequence of the Court's *Beaumartin* decision. In its *Chevrol* decision the Court indicated that the Council of State's reciprocity jurisprudence violates Article 6(1) of the Convention only in so far as it considers itself bound by the answer given by the Department of Legal Affairs; the Court did not condemn the Council of State's consulting the Department, but required that the Council of State retain the authority to make the final determination regarding reciprocal application. *Chevrol v. France*, 2003-III Eur. Ct. H.R. 159.

184. Mme Chevrol, CE, February 11, 2004, Rec. Lebon 67 (my translation). This decision was also expected, in that the Council of State has always considered that the decisions of the European Court of

B. Preliminary Considerations: Judicial Competence to Decide Questions and to Apply Law

Mme Chevrol's challenge to the decision of the national council of the *Ordre des médecins* took the form of a *recours pour excès de pouvoir* to the Council of State, which is an appeal for the annulment of an administrative decision based on the allegation that the decision violated a rule of law,¹⁸⁵ in this case Article 5 of the Declaration on Cultural Cooperation of the Evian Accords. First, the Council of State had to decide whether that provision was part of the internal French legal order. If it was, the decision of the *Ordre des médecins* may very well have violated it. Since the French Constitution is monist in principle,¹⁸⁶ there is no constitutional requirement that treaties or international agreements be "transformed" into domestic law by a specific legal act of Parliament or otherwise for their provisions to be applicable in domestic courts at the behest of litigants or by the court acting *ex officio*. Moreover, Article 55 accords priority to treaties and international agreements over domestic law: "Treaties or agreements duly ratified or approved, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party."¹⁸⁷ Despite these rather straight-forward principles, it is important to know certain things about the French legal system in order to fully understand and appreciate the problems faced by French tribunals in applying conventional international law.

After the decision in her favor by the ECHR, Mme Chevrol petitioned the Council of State to reexamine its decision of April 9, 1999. Although it is clear that the ECHR decision was binding on France,¹⁸⁸ could it be given effect by the Council of State? As Mme Chevrol's petition was not based on any existing provision in the Code of Administrative Justice, Mme Chevrol was in effect asking the Council of State to create a new remedy *ex nihilo*.¹⁸⁹ Although the Council of State had in the past allowed appeals not sanctioned by the Code of Administrative Justice in a few extraordinary situations, the *Commissaire du Gouvernement* recommended that it not do so in this case.¹⁹⁰ His recommendation was based on his opinion that, if an appeal to the Council of State was to be allowed following a decision of the ECHR, the

Human Rights have only a "relative *res judicata* authority" (*autorité relative de la chose jugée*), because there is no identity of parties in both cases. With respect to the *Chevrol* litigation, the parties to the case decided by the European Court of Human Rights in 2003 were Mme Chevrol and France, while the parties to the *Chevrol* cases decided by the Council of State in 1999 and 2004 were Mme Chevrol and the *Ordre des médecins*.

185. See GUETTIER, *supra* note 175, at 159-64, 206-08; see also JEAN RIVERO & JEAN WALINE, *DROIT ADMINISTRATIF* 201-26 (15th ed. 1994).

186. See *infra*, notes 38-43, and accompanying text; see also Kronenberger, *supra* note 159, at 325.

187. 1958 CONST. art. 55.

188. The decision was binding because "[t]he High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 46(1), Nov. 4, 1950, 312 U.N.T.S. 221, amended by Protocol No. 11, Europ. T.S. 155.

189. Rémy Schwartz, *Conclusions de Rémy Schwartz, Commissaire du Gouvernement*, 2004 Rec. Dalloz 1414.

190. *Id.*

creation of this new remedy, whose conditions would have to be precisely defined, should be done by legislative action.¹⁹¹ In this regard he directed the Council of State's attention to a provision in the Code of Criminal Procedure,¹⁹² enacted by Parliament in 2000, which provides that the reexamination of a definitive *criminal* judgment can be demanded "when . . . it results from a decision rendered by the ECHR that the guilty verdict was pronounced in violation of the provisions of the Convention on Human Rights and Fundamental Freedoms or the additional protocols thereto . . ." ¹⁹³ This provision of course was not available to Mme Chevrol because the judgment at issue in her case was a *civil* judgment. So even though France was bound by the European Convention to abide by the final judgment of the ECHR, a remedy to a private litigant was unavailable under domestic law.

There are three supreme judicial authorities in France: the Constitutional Council, the Council of State, and the Court of Cassation.¹⁹⁴ Each of these bodies views its role from a different institutional and historical perspective and each has limited competence with respect to the matters it can decide and the law that it may apply. It is often these perspectives and institutional limitations, rather than a principled or political unwillingness to give effect to international agreements or the decisions of international tribunals, which explain the refusal of a particular tribunal to apply international law.¹⁹⁵ Further complicating the application of international law by French courts, it is altogether possible that the same or similar legal question might be decided

191. *Id.*

192. *Id.*

193. C. PR. PÉN., art. 626-1 (my translation); see also C. PR. PÉN., arts. 626-2 through 626-6, which prescribe in detail how the challenge to a definitive criminal decision on the basis of a decision of the European Court of Human Rights works (who can request a reexamination; to whom such request is to be addressed; time limit for making request; how reexamination is to proceed if request is determined to be justified; etc.). This law was enacted in the aftermath of the confirmation by the Committee of Ministers of the Council of Europe of the decision of the European Commission of Human Rights in *Hakkar*, a criminal proceeding, condemning France for violating Article 6(1) of the European Convention and ordering France to pay damages of 62,000 francs to M. Hakkar. Committee of Ministers, decision of Mar. 19, 1997. In that same decision the Committee of Ministers also indicated that to comply with its obligations under the European Convention, a French court would have to reexamine its decision upon a finding that there had been a violation of the European Convention. See Résolution Finale ResDH (2001)4, req. no. 19033/91 (adopted by Committee of Ministers, Feb. 14, 2001).

194. There is some question whether the Constitutional Council is a true court or a judicial authority. See Kronenberger, *supra* note 159, at 326, n. 13. For comparative purposes, however, even though there are certainly significant procedural and other differences, the Constitutional Council makes decisions that are analogous to decisions made by the United States Supreme Court. See F.L. Morton, *Judicial Review in France*, 36 AM. J. COMP. L. 89 (1988); Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court*, 34 AM. J. COMP. L. 45 (1986).

195. See Baptiste Bonnet, *Le Conseil d'État, la Constitution et la norme internationale*, R.F.D.A. 56, 58 (Jan.-Feb. 2005) (arguing that administrative judges in applying Article 55 of the Constitution "base the resolution of the normative conflict [between international law and internal law] on the competence of the judge rather than on the relationship of primacy between legal orders." (my translation)); see also Jean-Paul Markus, *Le contrôle de conventionnalité des lois par le Conseil d'État*, L'ACTUALITÉ JURIDIQUE — DROIT ADMINISTRATIF [A.J.D.A.] 99 (Feb. 20, 1999) (discussing procedural requirements for the admissibility of appeals involving treaties and international agreements and judicial techniques employed by the Council of State in evaluating the compliance *vel non* of French law with treaty obligations).

differently by two or even all three of these supreme judicial authorities,¹⁹⁶ and there is no superior judicial body that has the authority to resolve such differences.¹⁹⁷

1. Constitutional Council

Since the French Revolution of 1789, at least during those periods when France was a republic, the law enacted by Parliament has occupied a privileged position. As the expression of the general will of the nation, it was considered the supreme source of law. In practice, prior to the adoption of the Constitution of 1958, this meant that no French court could deny effect to a law enacted by Parliament, even if that law contravened the Constitution.¹⁹⁸ While in theory the Constitution was supreme law, courts lacked the competence to apply the Constitution to deny effect to parliamentary enactments.¹⁹⁹ The Constitution of 1958 changed this system by its creation of the Constitutional Council, a body of nine persons, three named by the President of the Republic and three each by the President of the Senate and the President of the Chamber of Deputies, for nine-year terms. The most important function of the Constitutional Council is to evaluate recently enacted legislation, before its promulgation, for its conformity to the provisions of the Constitution.²⁰⁰ According to the Constitution, “[a] provision declared unconstitutional can neither be promulgated nor implemented.”²⁰¹ But the period for constitutional review is extremely limited: the Constitutional Council can review a law only after its adoption, but before its promulgation. Once promulgated, a law cannot be reviewed for its conformity to the Constitution by the Constitutional Council, or, for that matter, by any other judicial authority.²⁰² In

196. It is also possible that different chambers of the Court of Cassation resolve the same or similar questions differently.

197. *But see* 1958 CONST. art. 62, which provides that the decisions of the Constitutional Council are “binding on public authorities and on all administrative authorities and all courts.” Article 62, however, has been restrictively interpreted by the Court of Cassation. Following the decision of the Constitutional Council in *Traité portant statut de la Cour pénale internationale*, CC decision no. 98-408DC, Jan. 22, 1999, Rec. 30, the Court of Cassation considered that decision to have only relative, and not absolute, authority (*l'autorité de la chose jugée*), in order to allow some room for its own interpretation of the Constitution. Breisacher, Cass. Ass. plén., Oct. 10, 2001.

198. *See generally* Rogoff, *supra* note 16, at 72-78.

199. In many ways the French Revolution was a revolution against the role played by judges during the *Ancien régime*, and republican tradition in France since that time has always been distrustful of judges. As a result of these attitudes, French judges had long been denied the power to refuse effect to an act of Parliament, even if that act contravened a provision of the Constitution. The most influential French thinker in this regard is Jean-Jacques Rousseau, especially his work *DU CONTRAT SOCIAL* (1762). *See also* RAYMOND CARRÉ DE MALBERG, *LA LOI, EXPRESSION DE LA VOLONTÉ GÉNÉRALE* (1931); ÉDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS* (1921).

200. Another important function of the Constitutional Council, and one directly relevant to the application of conventional international law in France, is the Council's jurisdiction to review international commitments, before their ratification, for their conformity to the Constitution. 1958 CONST. art. 54.

201. 1958 CONST. art. 62.

202. *But see* État d'urgence en Nouvelle-Calédonie, CC decision no. 85-187DC, Jan. 25, 1985, Rec. 43 (deciding that judicial review of an already promulgated Act of Parliament is possible whenever it is modified or completed by another Act of Parliament currently submitted for review to the Constitutional Council; the new submission, in effect, allows the Constitutional Council to scrutinize the whole text).

addition, the Constitutional Council may not act on its own motion or on that of any other judicial authority or private person: only the President of the Republic, the Prime Minister, the President of the Senate, the President of the National Assembly, or sixty deputies or sixty senators may refer an act of Parliament to the Council.²⁰³ Thus, even assuming that Mme Chevrol had constitutionally-based rights (perhaps arising by virtue of Article 55), which were violated by the non-application of Article 5 of the Declaration on Cultural Cooperation of the Evian Accords or by the non-implementation of the decision of the ECHR, she would be unable to raise these matters before the Constitutional Council for lack of standing.

Furthermore, the competence of the Constitutional Council in reviewing acts of Parliament is limited to determining their conformity to the Constitution. It does not extend to determining whether an act of Parliament conforms to treaties or international agreements to which France is a party. In an important 1975 decision, the Constitutional Council held that "Article 61 of the Constitution does not confer on the Constitutional Council a general power of evaluation and decision-making identical to that of Parliament, but gives it only the power to rule on the conformity to the Constitution of laws referred to it for examination."²⁰⁴ Moreover, Article 55 does not accord constitutional status to treaties and international agreements. Its purpose is to establish a hierarchy of norms for judges rather than to prohibit Parliament from enacting laws that violate France's international obligations.²⁰⁵ To interpret Article 55 to accord constitutional status to international obligations, and thereby include them in the *bloc de constitutionnalité*, would be, as characterized by the *Commissaire du Gouvernement* in the famous *Nicolo* case, to adopt an extreme monism that would be ill advised.²⁰⁶

2. Council of State

The Council of State (or, more precisely, its fifth section, the *Section du contentieux*, consisting of about one hundred members) is France's supreme administrative court.²⁰⁷ Its competence extends to reviewing acts and decisions of

203. 1958 CONST. art. 61.

204. Loi relative à l'interruption volontaire de grossesse, CC decision no. 74-54DC, Jan. 15, 1975, Rec. 19 (my translation). See also LOUIS FAVOREAU & LOÏC PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL 300-27 (11th ed. 2001). For an exchange of views on the question of whether the Constitutional Council should continue to follow its 1975 decision, see Guy Carcassonne, *Faut-il maintenir la jurisprudence issue de la décision no. 74-54 DC du 15 janvier 1975?*, Les Cahiers du CONSEIL CONSTITUTIONNEL 93 (No. 7, 1999) (arguing that that decision has already been eviscerated by more recent jurisprudence and that post-1975 legal developments, like the decline in significance of the theory that the law is the expression of the general will and the rise in importance of European law, support its abandonment), and Bruno Genevois, *Faut-il maintenir la jurisprudence issue de la décision no. 74-54 DC du janvier 1975?*, Les Cahiers du CONSEIL CONSTITUTIONNEL 101 (No. 7, 1999) (arguing that the refusal of the Constitutional Council to examine acts of Parliament for their conformity to treaties and international agreements rests on solid legal grounds).

205. M. Frydman, *Conclusions de M. Frydman, Commissaire du Gouvernement*, 102 R.G.D.I.P. 1043, 1051, 1054 (1989).

206. *Id.* at 1051.

207. The Council of State also serves as advisor to the government. The judicial functions of the Council of State are performed by its *Section du contentieux*, which is divided into ten sub-sections.

French administrative authorities, including the French system of administrative courts.²⁰⁸ There is a complex body of law that demarcates the jurisdictional domain of administrative tribunals from that of the ordinary judicial courts, and a special tribunal, the *Tribunal des conflits*, exists to resolve jurisdictional conflicts between the two court systems should they arise in a particular case.²⁰⁹ Since the Constitutional Council alone has the power to declare a law unconstitutional, the Council of State may not do so. It lacks, therefore, the competence to examine acts of Parliament for their conformity to the Constitution, and must apply them even though they might be unconstitutional. It should be noted that French executive authorities have constitutionally-derived competence to adopt regulations (*règlements*) that deal with many matters which are dealt with by congressional legislation in the United States,²¹⁰ and the Council of State does possess the competence to review *règlements* for their conformity to the Constitution.²¹¹

Questions involving the application of provisions of treaties and international agreements arise frequently in administrative courts, where litigants are contesting some form of administrative action, like extradition, denial of a residence permit, deportation, denial of social benefits, economic regulation, regulation of professional qualifications and activities, organization of an election, etc. Adding to the importance of decisions of the Council of State is the prestige it enjoys as an institution. It has been described as “a remarkably successful institution . . . composed of the cream of the French civil service[,] . . . surround[ed] by a special aura[,] . . . [its] members constitut[ing] an élite.”²¹² And over the years its *Section du contentieux* has developed and applied judicial techniques, somewhat akin to the common law method of the

Decisions are rendered by a sub-section (for simple cases), two or three sub-sections together (the normal procedure), by the entire *Section du contentieux* (for cases presenting legal difficulties), or by the *Assemblée du contentieux* (in which the vice president of the Council of State and the six section presidents participate along with representatives of the *Section du contentieux* to give a certain solemnity to the decision). See GUETTIER, *supra* note 175, at 50-52; see also L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 64-79 (5th ed. 1998); RIVERO & WALINE, *supra* note 185, at 164-73.

208. Unlike the United States, France has an autonomous system of administrative courts. According to a law of 1790, which is still in force:

Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions.

Law of 16-24 August 1790, art. 13, *quoted in* BROWN & BELL, *supra* note 207, at 46. See generally FRANÇOIS BURDEAU, HISTOIRE DU DROIT ADMINISTRATIF (DE LA RÉVOLUTION AU DÉBUT DES ANNÉES 1970) (1995).

209. See RIVERO & WALINE, *supra* note 185, at 119-57.

210. 1958 CONST. art. 37.

211. See, e.g., Syndicat Général des Ingénieurs-Conseils, CE Sect., June 26, 1959, Rec. Lebon 394; see also MARCEAU LONG ET AL., LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE 541 (13th ed. 2001).

212. BROWN & BELL, *supra* note 207, at 62-63. Recruitment to the Council of State provides it with “a remarkable combination of young intellect and mature experience. It ensures that the Conseil has within its ranks both theoretical and practical expertise in public administration.” *Id.* at 83. See Bonnet, *supra* note 195 for a discussion of the Council of State’s preeminent role in the judicial management of the relationship between international and internal systems.

Anglo-American tradition, that have made its jurisprudence creative, flexible, and adaptive.²¹³

The most important recent decision of the Council of State with respect to the application of international agreements by French courts is its 1989 decision in the *Nicolo* case. In that decision the Council of State, reversing its prior jurisprudence, held that it could examine an act of Parliament enacted subsequent to an international obligation for its conformity to that international commitment, and by implication, that if the law was incompatible with the treaty obligation, it would set aside the law, thus according priority to the treaty obligation.²¹⁴ The *Nicolo* decision, in which the Council of State asserted its competence to review laws enacted by Parliament for their conformity to France's treaty obligations, represents a new, more proactive posture of the Council of State towards the application of international agreements. While it is true that *Nicolo* involved the compatibility of a French law with a provision of the Treaty of Rome, the foundational treaty of the European Union, which may be said to occupy a unique legal position, the Council of State did not base its decision on a provision of the Constitution specifically dealing with community law, but rather relied on Article 55, which applies to all treaties and international agreements.²¹⁵ Significantly, M. Frydman, *Commissaire du Gouvernement*, advised the Council of State in his *conclusions* that its pre-*Nicolo* jurisprudence constituted an obstacle to the introduction of international law into the internal order at the very time when

the era of unconditional supremacy of internal law is over. The norms of international law . . . have progressively conquered our legal universe Thus, certain entire sectors of our law, such as those dealing with the economy, labor, or the protection of human rights derive today largely from a true international legislation [T]he impossibility of giving priority to a treaty over a law constitutes a check to this evolution. France cannot simultaneously accept limitations on its sovereignty and maintain the supremacy of its law in its courts: that is illogical.²¹⁶

3. Court of Cassation

The Court of Cassation is the supreme judicial authority in the civil court system.²¹⁷ Its jurisdiction extends to ordinary civil cases between private parties, and in some situations between private parties and administrative authorities. It also has jurisdiction over criminal and commercial matters. Like the Council of State, the Court of Cassation traditionally had no power to refuse to apply a law enacted by Parliament, even if that law violated a pre-existing treaty or international agreement.²¹⁸

213. See generally YVES GAUDEMET, *LES MÉTHODES DU JUGE ADMINISTRATIF* (1972).

214. *Nicolo*, CE Ass., Oct. 20, 1989, Rec. Lebon 190. See also LONG ET AL., *supra* note 211, at 715; M. Frydman, *Conclusions de M. Frydman, Commissaire du Gouvernement*, 102 R.G.D.I.P. 1043 (1989).

215. See RONNY ABRAHAM, *DROIT INTERNATIONAL, DROIT COMMUNAUTAIRE ET DROIT FRANÇAIS: MISE À JOUR: LES EFFETS DES CONVENTIONS INTERNATIONALES EN DROIT INTERNE VII-VIII* (1990).

216. M. Frydman, *Conclusions de M. Frydman, Commissaire du Gouvernement*, 102 R.G.D.I.P. 1043, 1058 (1989) (my translation).

217. See generally JEAN-PIERRE GRIDEL, *INTRODUCTION AU DROIT ET AU DROIT FRANÇAIS* 568-83 (2d ed. 1994); JACQUES GHESTIN & GILLES GOUBEUX, *TRAITÉ DE DROIT CIVIL: INTRODUCTION GÉNÉRALE* 405-31 (4th ed. 1994).

218. According to a rule of interpretation called the Matter Doctrine, named after *Procureur Général*

In its 1975 decision in *Administration des Douanes v. Société Cafés Jacques Vabre*,²¹⁹ however, the Court broke with its former jurisprudence and asserted its competence to accord priority to a prior treaty (the Treaty of Rome) over a subsequent law enacted by Parliament. The Court justified its decision on the basis of Article 55 of the Constitution and on the specific character of the legal order of the European community.²²⁰ Subsequently, the Court has reaffirmed its *Jacques Vabre* jurisprudence, relying solely on Article 55, thus clearly extending its applicability beyond the realm of European law to treaties and international agreements in general.²²¹

C. Judicial Scrutiny of the Ratification, Approval, and Entry into Force of Treaties and International Agreements

Mme Chevrol sought to invoke a provision of the Evian Accords in her 1999 appeal to the Council of State. In order for the Council of State to accede to her request, however, the Evian Accords must be applicable as internal law. According to Article 55 of the Constitution: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party."²²² Although the language of Article 55 could be interpreted narrowly, simply to accord priority to a treaty or international agreement over a law, rather than to accord it full legal effect in internal law, the Council of State and Court of Cassation have decided otherwise,²²³ regarding Article 55 as expressing the notion, accepted by French courts since the nineteenth century, that "treaties have the force of law."²²⁴

Article 55 requires that treaties or agreement be published in order to be applicable as internal law. French courts have always regarded themselves as competent to refuse application to a treaty or agreement that has not been published.²²⁵

Matter, who proposed it in his *conclusions* in a 1930s case before the Court of Cassation, "there exists a presumption that it was not the intention of the law to infringe upon the treaty." Sanchez, concl. sur Cass. civ., Dec. 22, 1931, S. 1932.1.257. See also DAILLIER & PELLET, *supra* note 20, at 287.

219. Cass. ch. mixte, May 24, 1975, D. 1975, 497. See also FRANÇOIS TERRÉ & YVES LEQUETTE, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE* 15, 17 (10th ed. 1994) (describing the decision as "of exceptional importance" and having provoked "a legal earthquake").

220. COMBACAU & SUR, *supra* note 20, at 188. *Jacques Vabre* involved a conflict between a provision of the Treaty of Rome and a subsequent internal customs law.

221. *Id.*

222. 1958 CONST. art. 55. The French Constitution distinguishes between two types of international obligations: "treaties," which are subject to ratification, and "international agreements," which are subject to approval. Although these two modalities of undertaking international obligations differ under French law with respect to who is authorized to negotiate them and with respect to internal procedures regarding their entry into force, both treaties and international agreements, once in force, produce exactly the same legal effects under both international law and internal French law. For the purposes of this Article, then, it is not necessary to distinguish between them.

223. ABRAHAM, *supra* note 1, at 85 (citing Males, Cass. crim, June 29, 1972, Bull. crim. 2002, 595, and Rekhou, CE Ass., May 29, 1981, Rec. Lebon 220). But see Loi de finances pour 1981, CC decision no. 80-126DC, Dec. 30, 1980, Rec. 1998, 53.

224. ABRAHAM, *supra* note 1, at 73.

225. There are certain exceptions to the requirement of publication. See, e.g., *Société Dumez v. Iraq*, Cass. 1e civ., July 15, 1999, Bull. civ. 1 (U.N. Security Council Resolution 687 applied although not published); see generally Elise Mangeot, *Étude: Les rapports droit international—droit interne et la publication officielle des engagements internationaux*, REVUE DE L'ACTUALITÉ JURIDIQUE FRANÇAISE (Dec. 2004).

For example, the Council of State recently refused to apply a Franco-Tunisian agreement on technical and military cooperation at the behest of a litigant because it had not been published in the *Journal officiel*.²²⁶ Even if an agreement has been published, however, it may be refused application if it was not ratified or approved as required by Article 55, since then it could not be considered a “treaty or international agreement” within the meaning of the Constitution. This is the position of the Council of State with respect to the Universal Declaration of Human Rights of 1948, which, although published in the *Journal officiel*, is not considered a “treaty or international agreement” within the meaning of Article 55.²²⁷ The Court of Cassation, however, takes a different view of the applicability of the Universal Declaration of Human Rights. The Criminal Chamber regards the Universal Declaration as a treaty whose provisions may be invoked by litigants;²²⁸ while the Social Chamber, although considering the Universal Declaration to be a treaty in the constitutional sense, deems its provisions inapplicable as non-self-executing.²²⁹ The Constitutional Council, like the Council of State, does not consider the Universal Declaration to be a treaty or international agreement within the meaning of the Constitution. It has recently referred to the Universal Declaration as an “international legal text,” rather than as a “treaty or international agreement.”²³⁰

Article 53 of the French Constitution requires parliamentary approval for the ratification or approval of treaties and international agreements dealing with certain matters:

Peace treaties, commercial treaties or agreements relating to international organization, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that involve cession, exchange or addition of territory, can be ratified or approved only by virtue of an Act of Parliament.²³¹

According to the settled jurisprudence of the Council of State and the Court of Cassation, administrative and civil courts had refused to examine the regularity of treaty ratification procedures on the grounds that they are governmental acts pertaining to foreign relations and that questioning them would entail examining relations between the executive and Parliament, which, under French law, courts lack competence to do.²³² Recently, however, in its 1998 decision in *SARL du parc d'activités de Blotzheim et SCI Haselaecker*, the Council of State abandoned this

226. M. Wattenne, CE, Nov. 12, 2001, Rec. Lebon 820. The publication requirement may be regarded as introducing a certain dualism into the French system of inserting international agreements into the internal legal order. The Government has a discretionary power to publish treaties and international agreements, and its refusal to do so is not reviewable at the behest of a litigant, as it is considered an *acte de gouvernement*.

227. Nodière, CE, Feb. 3, 1999, Rec. Lebon 9; M. Alrihami, CE, July, 27, 2001, req. no. 214919.

228. Gallien, Cass. crim., Jan. 29, 1997, Bull. crim., p. 116.

229. X . . . v. CAF de la Seine-saint-Denis, Jan. 22, 1998, Cass. soc., Bull. civ. V, p. 23.

230. CC, decision no. 98-405DC, Dec. 29, 1998, J.O. Dec. 31, 1998.

231. 1958 CONST. art. 53. See also 1958 CONST. art. 34, 37 (enumerating those “matters that are for statute,” as opposed to “regulations”).

232. Dame Caraco, CE, Feb. 5, 1926, Rec. Lebon 125; Reyrol, Cass. 1e civ., Jan. 25, 1977, Bull. civ. I, No. 43. This jurisprudence had been reconfirmed as recently as 1995 by the Council of State in *M. Roujanski*, CE, Jan. 11, 1995, req. no. 154273.

position, holding that by virtue of its responsibility under Article 55 of the Constitution to accord priority to “treaties or agreements duly ratified or approved” over acts of Parliament, it had the competence to examine the regularity of the ratification and approval of treaties and international agreements.²³³ In that case, two enterprises objected to the applicability of a presidential decree publishing an exchange of notes between the French and Swiss governments in the *Journal officiel* concerning an amendment to the annex to a 1949 bilateral treaty between France and Switzerland relating to the construction and operation of the Basel-Mulhouse airport.²³⁴ They challenged the decree as violating Article 53 on the grounds that, because the exchange of notes committed the finances of the state, such an international undertaking had to be approved by an act of Parliament.²³⁵ The Council of State decided that it did indeed have the competence to examine the regularity of the ratification or approval of treaties and international agreements:

[I]t results from the combination of [Articles 53 and 55] that treaties or agreements falling within the province of Article 53 of the Constitution and whose ratification or approval has occurred without having been authorized by a law can not be regarded as regularly ratified or approved within the meaning of Article 55 [Moreover,] it is for the administrative tribunal to rule on the validity of a ground raised before it and based on the violation, by the act of publication of a treaty or agreement, of the provisions of Article 53 of the Constitution.²³⁶

After the decision in *Blotzheim*, litigants in proceedings in administrative tribunals may seek to avoid the application of a treaty or agreement by arguing that it was not “duly ratified or approved” (*régulièrement ratifié ou approuvé*). If the tribunal finds that the treaty or agreement was not duly ratified or approved and thus inapplicable in the proceeding before it, it is in essence refusing to give effect to an international obligation since France would still be bound by it.²³⁷ *Blotzheim*, therefore, may be regarded as a decision evidencing a dualist view of the relationship

233. SARL parc des activités de Blotzheim et SCI Hasselaecker, CE Ass., Dec. 18, 1998, Rec. Lebon 484; see also M. Bachelier, *Conclusions de M. Bachelier, Commissaire du Gouvernement*, 103 R.G.D.I.P. 560 (1999).

234. Kronenberger, *supra* note 159, at 336-37.

235. *Id.* at 337. Unfortunately for the petitioners, the Council of State also decided that the language of Article 19 of the 1949 treaty, which had been duly ratified by Parliament, allowed for subsequent modifications to its annex by a simplified procedure, Convention relative à la construction et à l'exploitation de l'aéroport de Bâle-Mulhouse, à Blotzheim, Fr.-Switz., July 4, 1949, J.O. No. 113, p. 7322, and that the choice of that simplified procedure by the government, falling as it did within the domain of the conduct of diplomatic relations, was not subject to review by administrative tribunals.

236. SARL parc des activités de Blotzheim et SCI Hasselaecker, CE Ass., Dec. 18, 1998, Rec. Lebon 484 (my translation); see also M. Bachelier, *Conclusions de M. Bachelier, Commissaire du Gouvernement*, 103 R.G.D.I.P. 560 (1999).

237. Vienna Convention on the Law of Treaties, art. 46, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (“A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.”).

between the international and internal legal orders.²³⁸ The agreement must be properly incorporated into the domestic legal order before a domestic court can apply it.

Two years later, in its *Bamba Dieng* decision, the Council of State applied its new jurisprudence to declare illegal a decree authorizing the publication of a 1994 agreement modifying a 1974 convention for judicial cooperation between France and Senegal on the grounds that the agreement, by virtue of Article 53, had to be approved by an act of Parliament because it concerned fundamental principles of property, property rights, and commercial obligations—matters which are reserved to Parliament by Article 34 of the Constitution.²³⁹ In a more recent decision, however, the Council of State limited its decisions in *Blotzheim* and *Bamba Dieng* by holding that it could not examine the constitutionality of a law authorizing the ratification of a treaty by decree, even though it appeared that the law and the decree violated provisions of the Constitution (Articles 53 and 72), because the Council of State lacked the competence to examine the constitutionality of a law enacted by Parliament and the law also prevented it from examining the decree.²⁴⁰ In that case, the Commune de Porta petitioned the Council of State to annul a decree ordering the publication of a treaty between France and Andorra rectifying their joint frontier by an exchange of territory. The Council of State relied on its theory of *loi-écran* (law-screen) in holding, in effect, that the law authorizing the ratification of the agreement erected a “screen” that prevented it from examining the constitutionality of the decree of publication.²⁴¹ This decision evoked strong criticism from commentators because the violation of the

238. Florence Poirat, *Jurisprudence française en matière de droit international public: Le Conseil d'État et le contrôle de régularité de la conclusion des traités internationaux*, R.G.D.I.P. 753, 762 (1993); see also Kronenberger, *supra* note 159, 338-39. Kronenberger argues that, by its decision in *Blotzheim*, the *Conseil d'État* affirms itself as the judicial body responsible for an indirect *a posteriori* control of the formal constitutionality of international conventions Furthermore, the new importance recognised to the enacting act of an international convention, amounting to an act of “reception” of conventions into domestic legal order, leads one to conclude that the *Conseil d'État* has adopted the view that the French legal order is closer to a dualistic system than to a monistic one.

Id. The Council of State has also applied its *Blotzheim* jurisprudence to international agreements entered into pursuant to the Constitution of 1946, even though that Constitution is generally regarded as more monist in orientation. *Id.* Cavaciuti, CE, June 16, 2003, Rec. Lebon, req. no. 246794.

[T]reaties or agreements which come within Article 27 of the Constitution of 1946 and which were ratified or approved without having been authorized by a law cannot be regarded as regularly ratified or approved within the meaning of Article 26 of the Constitution of 27 October 1946. With respect to their effects in internal law, the publication of a treaty or agreement that falls within the scope of Article 27 . . . can legally occur only if the ratification or approval of that treaty had been authorized by a law.

Id. (my translation).

239. *Bamba Dieng*, CE, Feb. 23, 2000, Rec. Lebon 72; see also M. Agoun, CE Ass., Mar. 5, 2003, req. no. 242860.

240. *Commune de Porta*, CE Sect., July 8, 2002, Rec. Lebon 260. In *Commune de Porta*, the Council of State invoked the theory of the *loi-écran* (law-screen) according to which the law authorizing ratification created a “screen” preventing it from examining the constitutionality of the decree. This theory is premised on the proposition that French courts cannot refuse to apply a law. See Nicolas Maziau, *Jurisprudence française relative au droit international (année 2002)*, 48 A.F.D.I. 699, 702-03 (2003). The law-screen theory was enunciated by the Council of State in *Arrighi et Dame Coudert*, CE, 1936, Rec. Lebon 966.

241. See Maziau, *supra* note 240, at 702.

Constitution appeared evident as the Franco-Andorran treaty provided for a cession of territory without consultation with the affected populations, which is clearly required by Article 53.²⁴²

In 2001 the Court of Cassation followed the lead of the Council of State in declaring the Franco-Senegalese accord of 1994 inapplicable. Abandoning its former jurisprudence, the Court of Cassation agreed to examine the regularity of the insertion of an international convention into the domestic legal order.²⁴³ Like the Council of State in *Bamba Dieng*, the Court of Cassation held that the agreement in question related to “the property regime, real property rights and civil and commercial obligations”²⁴⁴ which, by virtue of Article 34, fall within the domain of the law, and thus, according to Article 53, requires an act of Parliament in order for it to be applicable in France.²⁴⁵

The Constitutional Council also plays a role with respect to questions involving ratification and approval of treaties and international agreements, but it is competent to do so only before the particular treaty or agreement has been ratified or approved. Pursuant to Article 54 of the Constitution, the Constitutional Council has the competence to examine the constitutionality of treaties and international agreements in certain situations:

If the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other Assembly, for from sixty deputies or sixty senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.²⁴⁶

Article 54 has engendered debate as to whether it attests to the primacy of international law or whether, on the other hand, it prioritizes internal law.²⁴⁷ While on its face Article 54 accords jurisdiction to the Constitutional Council to assure that treaties conform to the Constitution, it applies only to “international commitments,” which must be “ratified or approved,” presumably by Parliament, as determined by Article 53. Thus, only some international undertakings are susceptible to review by the Constitutional Council before they enter into force. Furthermore, if an international commitment is not referred for review in a timely manner by one of the officials or institutions authorized to do so, it may not subsequently be reviewed for its conformity to the Constitution by the Constitutional Council. These limitations on the operation of Article 54 may allow France to undertake an international obligation, which might be contrary to a provision of the Constitution, thereby, in effect, according priority to the international commitment. Furthermore, if the Constitutional Council determines that a provision in a proposed international commitment does not conform to the Constitution, Parliament may amend the Constitution to allow France

242. *Id.* at 702-03.

243. Agence pour la sécurité de la navigation aérienne en Afrique, Cass. Civ., May 29, 2001, Bull. Civ. D. 2001, IR, p. 2001.

244. *Id.* (my translation).

245. 1958 CONST. art. 34, 53.

246. *Id.* art. 54.

247. BERRAMDANE, *supra* note 149, at 165.

to undertake the commitment. In its three most recent decisions under this provision, the Constitutional Council held that the referred treaty provisions required modification of the Constitution.²⁴⁸ The required revision of the Constitution may be done by a three-fifths majority of the votes cast by “Parliament convened in Congress.”²⁴⁹

D. *The Internal Effects of Treaties and International Agreements*

Mme Chevrol sought to invoke Article 5 of the Declaration on Cultural Cooperation of the Evian Accords of 1962 in her quest to have the decision of the national council of the *Ordre des médecins* annulled by the Council of State. According to that provision, “[a]cademic diplomas and qualifications obtained in Algeria and in France under the same conditions as regards curriculum, attendance and examinations shall be automatically valid in both countries.”²⁵⁰

For a provision of a treaty or agreement to be applicable in a French court, it must be duly ratified or approved, published, and that provision must produce “direct effects” (*effets directs*). The notion of direct effect is similar to that of “self-executing” in U.S. law. In principal, the provisions of treaties and agreements are directly applicable as internal law in France.²⁵¹ But this is not the case where the treaty as a whole or the particular provision in question is only recommendatory or is addressed only to the states that are party to the treaty or agreement or where modalities for the application of the rules contained in the provision are not sufficiently precise.²⁵² In such cases, the treaty, explicitly or implicitly, calls for further action by the state parties for its implementation. To determine whether a treaty or agreement has direct effect or not, reference must therefore be made to the precise terms of the instrument to ascertain whether it was the intention of its framers that it create rights or obligations for individuals or, on the other hand, that it merely define objectives for subsequent implementation by the state parties.²⁵³ One important indication of direct effects is whether the obligations created by the instrument are sufficiently precise to be applied without further elaboration by national law or subsequent international agreement.²⁵⁴ The requirement of direct effect accords considerable discretion to courts to apply or not to apply the provisions of treaties and

248. Engagements internationaux relatifs à l'abolition de la peine de mort, CC decision no. 2005-524/525DC, Oct. 13, 2005; *Traité portant statut de la Cour Pénale Internationale*, CC decision no. 98-408DC, Jan. 22, 1999; *Charte Européenne des Langues Régionales Minoritaires*, CC decision no. 99-412DC, June 15, 1999. For further discussion, see Lachaume, *supra* note 175, at 713-14.

249. 1958 CONST., art. 89.

250. *Chevrol v. France*, 2003-III Eur. Ct. H.R. 159.

251. Denis Alland suggests that there should be a presumption that provisions of treaties and agreements be directly applicable because of “the contemporary . . . penetration of international law into internal law, [and] the multiplication of international and regional human rights conventions” Denis Alland, *L'applicabilité directe du droit international considérée du point de vue de l'office du juge: des habits neufs pour une vieille dame?*, 102 R.G.D.I.P. 203, 221 (1998) (my translation). Alland also suggests that such a presumption is solidly grounded in the French constitutional system, referring to its monist orientation and to Article 55. *Id.*

252. See ABRAHAM, *supra* note 1, at 77-79; Alland, *supra* note 251, at 221.

253. ABRAHAM, *supra* note 1, at 77.

254. *Id.* at 79.

international agreements, and thereby represents another dualist tendency in the approach of French courts to the relation of the international and internal legal orders.²⁵⁵

In *Chevrol*, the Council of State appeared to regard Article 5 of the Declaration on Cultural Cooperation of the Evian Accords as having direct effect; otherwise it could simply have rejected Mme Chevrol's appeal as not founded on a provision of an international agreement that could be invoked before an administrative tribunal. That solution would have allowed it to avoid dealing with the problems raised by its prior decisions in *Nicolo* and *G.I.S.T.I.* (1990) as well as with the problem posed by Article 6(1) of the European Convention. In his *conclusions* in *Chevrol*, the *Commissaire du Gouvernement* described the Evian Accords as "international agreements within the meaning of Article 55 of the Constitution."²⁵⁶ He then considered the question of whether or not Article 5 produced direct effects, and concluded that at least for purposes of this appeal it must be presumed to do so.²⁵⁷ He explained that the Ministry of Foreign Affairs determined that Article 5 produced direct effects before it considered the reciprocity question.²⁵⁸ According to accepted criteria, Article 5 would indeed produce direct effects: it is a precise statement of an easily applicable rule and neither it nor the document of which it is a part calls for subsequent action by the state parties for its implementation.²⁵⁹

Recent decisions of the Council of State and the Court of Cassation dealing with the direct effect of certain provisions of the United Nations Convention on the Rights of the Child highlight the vast latitude the direct effects requirement gives to national courts to apply or not to apply provisions of treaties or international agreements. As a general matter, French civil and administrative courts have approached the application of the criteria for according direct effect to a provision of the Convention somewhat differently. The Court of Cassation has denied the direct effect of any of the provisions of the Convention; while the Council of State has approached the Convention "article by article."²⁶⁰ In a 1995 decision,²⁶¹ the Council of State applied Article 16 of the Convention to evaluate the legality of an administrative decision denying a foreign applicant a permit to reside in France, even though his spouse possessed such a permit and the couple had a child.²⁶² The Council of State held that Article 16 produced direct effects, but it decided nevertheless that it was not violated

255. See Alland, *supra* note 251, at 220 ("[T]he dualist explanation better accounts for the practice.") (my translation).

256. R. Schwartz, *Conclusions de R. Schwartz, Commissaire du Gouvernement*, 103 R.G.D.I.P. 791,794 (1999) (citing Mme Teytaud, CE, Nov. 25, 1998, Rec. Lebon 436; Société Moraly et société "Maisons Moraly," CE, Jan. 31, 1969, Rec. Lebon 51).

257. *Id.* at 795.

258. *Id.* at 796.

259. See Alland, *supra* note 251, at 221-24 (discussing the criteria for direct applicability).

260. See Lachaume, *supra* note 175.

261. Demirpence, CE, Mar. 10, 1995, Rec. Lebon 610.

262. Article 16 provides in full: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks." U.N. Convention on the Rights of the Child, art. 16, Nov. 20, 1998, 1577 U.N.T.S. 3.

by the refusal to issue the permit.²⁶³ More recently, however, the Council of State decided that three articles of the Convention, including Article 16, did not produce direct effects, creating “only obligations between States and therefore cannot be directly invoked in support of an appeal for an ultra vires act against a deportation order.”²⁶⁴ The application of Article 16 in this case may very well have required the Council of State to annul a deportation order, which it apparently was reluctant to do.

In a subsequent decision, *G.I.S.T.I. (1997)*, concerning the eligibility for certain social benefits of a foreigner living in France,²⁶⁵ the Council of State held that Articles 24(1),²⁶⁶ 26(1),²⁶⁷ and 27(1)²⁶⁸ “did not produce direct effects with respect to private individuals [and] could not be effectively invoked in support of pleadings for the annulment of an individual decision or regulation.”²⁶⁹ In his *conclusions* in that case, *Commissaire du Gouvernement Abraham* indicates that no decision of the Council of State has ever sought to systematically enumerate the criteria for direct effect.²⁷⁰ In addressing this question, he points out that internal law governs, as international law is indifferent as to how a state implements its international conventional obligations internally.²⁷¹ He then states:

263. Demirpence, CE, Mar. 10, 1995, Rec. Lebon 610.

264. *Préfet du Val de Marne v. Medjani*, CE, Jan. 18, 2002, Rec. Lebon, req. no. 214664 (my translation). Also before the Council of State in this case were Article 7, which states:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law

and Article 9, which states: “States Parties shall ensure that a child shall not be separated from his or her parents against their will” U.N. Convention on the Rights of the Child, art. 7, 9, Nov. 20, 1998, 1577 U.N.T.S. 3. Unlike Article 16, which speaks in unconditional terms, both Articles 7 and 9 impose affirmative obligations on states party to the Convention. *Id.*

265. *Groupe d’information et de soutien des travailleurs immigrés (G.I.S.T.I.)*, CE, Sect., Apr. 23, 1997, Rec. Lebon 142.

266. Article 24(1) provides:

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

U.N. Convention on the Rights of the Child, art. 24(1), Nov. 20, 1998, 1577 U.N.T.S. 3.

267. Article 26(1) provides: “States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.” U.N. Convention on the Rights of the Child, art. 26(1), Nov. 20, 1998, 1577 U.N.T.S. 3.

268. Article 27(1) provides: “States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.” U.N. Convention on the Rights of the Child, art. 27(1), Nov. 20, 1998, 1577 U.N.T.S. 3.

269. *Groupe d’information et de soutien des travailleurs immigrés (G.I.S.T.I.)*, CE Sect., Apr. 23, 1997, Rec. Lebon 142 (my translation). More recent decisions of the Council of State have also denied direct effect to other provisions of the United Nations Convention on the Rights of the Child. *Kharoubi*, CE, July 30, 2003, Rec. Lebon, req. no. 252763 (denying direct effect to articles 9, the right of a child not be to separated from his or her parents, and 10, obligation of state parties to facilitate family reunification); *Mme Labiah épouse Miladi*, CE, Oct. 27, 2003, Rec. Lebon, req. no. 255197 (denying direct effect to Article 18, which concerns the obligations of parents to their children).

270. *Abraham*, *supra* note 160, at 588.

271. *Id.* at 589.

It seems to us that one can assert that in French law, since the adhesion of our legal system to the monist principle by virtue of Article 26 of the Constitution of October 27, 1946 and confirmed by Article 55 of the Constitution of 1958, international treaties, incorporated into the national legal order by the effect of their ratification and publication in the *Journal Officiel*, are generally presumed to produce direct effects in internal law, that is to say, to create subjective rights of which individuals may avail themselves before national courts.²⁷²

The presumption of direct effect is overcome, however, if the provision is intended solely to govern the relationships between states or if the provision is imprecise or conditional. Significantly, M. Abraham rejects as an autonomous criterion formulas like “the State parties undertake to guarantee” such and such a benefit or “undertake to recognize” such and such a right.²⁷³ He regards reliance on such expressions to deny direct effect as according them more meaning in elucidating the intent of the parties than they are worth, especially when it is a question of the application of a provision of a multilateral convention where some parties are monist states and others dualist.²⁷⁴

M. Abraham raises an additional problem: even if the provisions of the Convention do not produce direct effects, can they be invoked to challenge a regulation (*acte réglementaire*)? He regards the question of *invocabilité* as different from the question of direct effect. Even if an individual litigant cannot rely on a treaty provision to procure a personal benefit accorded by that provision because it is not sufficiently precise (and therefore does not produce a direct effect), should he be able to invoke it to resist the application to him of a regulation? After all, the state is obligated to adopt or modify legislation or regulations to achieve a certain objective, and it has not done so. And, so far as the treaty obligation is concerned, it is part of national law, according to the express (monist) language of Article 55.²⁷⁵ The Council of State, however, did not follow the suggestion of the *Commissaire du Gouvernement*. In rejecting petitioner's claims it stated: “these stipulations [of the Convention on the Rights of the Child], which do not produce direct effects with respect to individuals, may not be effectively invoked in support of arguments for the annulment of an individual or regulatory decision”²⁷⁶

The Court of Cassation denies direct effect to all the provisions of the Convention,²⁷⁷ relying on Article 4 of the Convention by virtue of which “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in this Convention”²⁷⁸ The divergent approaches by the Council of State and the Court of Cassation to the applicability of provisions of the Convention on the Rights of the Child is less of a problem in practice than in theory, since the Council of State has been extremely

272. *Id.* (my translation).

273. *Id.* at 590 (my translation).

274. *Id.*

275. *Id.* at 592-94.

276. Groupe d'information et de soutien des travailleurs immigrés (G.I.S.T.I.), CE, Sect., Apr. 23, 1997, Rec. Lebon 142 (my translation).

277. Lejeune, Cass. civ., July 15, 1993, Bull. civ., No. 259.

278. U.N. Convention on the Rights of the Child, art. 4, Nov. 20, 1988, 1577 U.N.T.S. 3.

reluctant to recognize the direct effect of provisions of the Convention, and the Court of Cassation, rather than explicitly denying direct effect to provisions of the Convention, has interpreted narrowly the scope of applicability of provisions of the Convention so that they would not conflict with French law.²⁷⁹

E. Interpretation of Treaties and International Agreements

The traditional approach of French courts to the interpretation of treaties and international agreements was to refer them to the Ministry of Foreign Affairs for interpretation and then to follow the Ministry's interpretation,²⁸⁰ although the civil chambers of the Court of Cassation regarded themselves as competent to interpret provisions of treaties and agreements that raised only questions of "private interest" (*d'intérêt privé*), rather than questions of "international relations" (*d'ordre public international*).²⁸¹ Also, questions of interpretation of the Treaty Establishing the European Community and of acts of the institutions of the Community are, in principle, to be referred to the European Court of Justice.²⁸² There is an important exception to the general rule, however, when the court determined that the provision in question was clear on its face and raised no question of interpretation (the *acte clair* doctrine). In such cases the court did not refer the question of interpretation to the Ministry or to the European Court, but proceeded directly to the application of the provision at issue.

In an important decision of 1990, however, the Council of State reversed its prior jurisprudence and decided that it was competent to interpret an international agreement whose content was ambiguous or uncertain.²⁸³ The Council of State may still seek the opinion of the Ministry of Foreign Affairs, but it no longer considers

279. Alland, *supra* note 251, at 215-19.

280. Veuve Murat, comtesse de Lipona, CE, July 23, 1823, Rec. Lebon 544.

[I]t must be noted that France is the only major western country to practice this system, which is a sort of "auto-limitation" of the judicial function. In all other countries, tribunals regard themselves as fully competent to interpret treaties as well as internal laws. The interpretation of the texts applicable to the litigation constitutes in effect a normal part of the function of the judge and one would expect that he would exercise it himself except for some extraordinary difficulty.

ABRAHAM, *supra* note 1, at 95 (my translation); see also COMBACAU & SUR, *supra* note 20, at 192-93.

281. ABRAHAM, *supra* note 1, at 97; see generally Denis Alland, *Jamais, parfois, toujours. Réflexions sur la compétence de la Cour de cassation en matière d'interprétation des conventions internationales*, 100 R.G.D.I.P. 599, 603 (1996).

282. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Treaty Establishing the European Community, art. 234, Mar. 25, 1957, 2002 O.J. (C 325) 33. *But see* *Ministre de l'intérieur v. Cohn-Bendit*, CE Ass., Dec. 22, 1978, Rec. Lebon 524; LONG ET AL., *supra* note 211, at 669.

283. *Groupe d'information et de soutien des travailleurs immigrés (G.I.S.T.I.)* (1990), CE Ass., June 29, 1990, Rec. Lebon 171; see also LONG ET AL., *supra* note 211, at 734.

itself to be bound by its interpretation of the treaty or agreement in question.²⁸⁴ In a subsequent decision, the Council of State reminded an administrative court of appeals that it was not bound by an interpretation of the Ministry of Foreign Affairs of the Evian Accords of March 19, 1962.²⁸⁵ The Court of Cassation now also regards itself as competent to interpret treaties and international agreements whose meaning is unclear.²⁸⁶

In a 1994 decision, *Beaumartin v. France*,²⁸⁷ the ECHR held that the Council of State's practice, which had already been abandoned in its *G.I.S.T.I.* decision of 1990, of referring questions of interpretation to the Ministry of Foreign Affairs and regarding itself as bound by that interpretation, violated Article 6(1) of the European Convention.²⁸⁸ In its view "[o]nly an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation 'tribunal' within the meaning of Article 6(1). The Conseil d'Etat did not meet these requirements in the instant case."²⁸⁹ The *Beaumartin* litigation provides an excellent example of the interplay between French courts and the ECHR, and in this respect foreshadows the later *Chevrol* litigation. It also demonstrates the prescience of the *Commissaire du Gouvernement* Abraham, in his *conclusions* in the *G.I.S.T.I. (1990)* case, in recommending that the Council of State abandon its prior jurisprudence concerning the interpretation of treaties and international agreements and the responsiveness of the Council of State to France's obligations under international law.

What principles of interpretation do French courts use when called upon to interpret an international agreement? Although France is not a party to the Vienna Convention on the Law of Treaties, it appears that French courts do consult the principles of interpretation contained in Articles 31-33 of the Convention, which they regard as codifying customary international law.²⁹⁰ Court decisions, however, do not

284. In *G.I.S.T.I. (1990)* the Council of State had to interpret the words "minor children" in a provision in a 1985 addition to the Evian Accords. Petitioners argued that the words "minor children" referred to minority under Algerian law, which was less than nineteen years for males and less than twenty-one years for females. Minority within the meaning of French law, however, was less than eighteen years of age. See Abraham, *supra* note 179, at 905.

285. Dame Teytaud, CE, Nov. 25, 1998, Rec. Lebon 436; see also Serra Garriga, CE, Dec. 21, 1994, Rec. Lebon 569 (declining to follow the interpretation recommended by the Ministry of Foreign Affairs).

286. "It is the function of the judge to interpret the international treaties invoked in the case before it, without it being necessary to solicit the opinion of a non-judicial authority." Banque Africaine de développement, Cass. 1e civ., Dec. 19, 1995, Bull. civ. I, 327 (my translation); Caisse autonome mutuelle de retraite des agents de chemin de fer, Cass. soc., Apr. 23, 1993, Bull. soc..

287. *Beaumartin v. France*, 19 Eur. Ct. H.R. 485 (1994). For the Council of State's decision, see *Beaumartin*, CE, Jan. 27, 1989, Rec. Lebon.

288. The Court described the practice in these terms: "when the administrative court encountered serious difficulties in interpreting an international treaty, it was obliged to request the Minister for Foreign Affairs to clarify the meaning of the impugned provision and it then had to abide by his interpretation in all circumstances." *Beaumartin v. France*, 19 Eur. Ct. H.R. 485, 503 (1994).

289. *Id.*

290. COMBACAU & SUR, *supra* note 20, at 193; DAILLIER & PELLET, *supra* note 18, at 238-39. Cf. DECAUX ET AL., *supra* note 20, at 269 ("It is impossible to determine positively the methods of interpretation of French judges . . . [J]udges do not refer to the methods of interpretation contained in the Vienna Convention on the Law of Treaties . . ."). See also Gérard Teboul, *Le Conseil d'État et la Convention de Vienne sur le droit des traités du 23 mai 1969: quelques observations*, in MÉLANGES

refer explicitly to the Vienna Convention.²⁹¹ It is noteworthy, however, that *Commissaire du Gouvernement Bachelier* in his *conclusions* in a recent case relied on Articles 31-33 of the Vienna Convention for rules applicable to the interpretation of treaties.²⁹² It also appears that French courts do not necessarily regard themselves as bound to follow the interpretation of treaties of international tribunals,²⁹³ although they often do so in order to enable France to fulfill its international obligations.²⁹⁴

The competence of administrative and civil courts to interpret treaties and international agreements gives them vast powers to define and police the international legal obligations of France and to, in effect, accord priority to French law over an international commitment. An excellent example of the exercise of that power is the Council of State's 1996 decision in *Koné*.²⁹⁵ In that case the government sought to extradite M. Koné to Mali pursuant to a 1962 bilateral extradition treaty between France and Mali.²⁹⁶ The Council of State decided that the principle of the law of extradition, expressed in a 1927 French law, according to which a requested state could refuse to extradite an individual if his extradition is requested for a political end, was in fact a fundamental principal of the laws of the Republic (*un principe fondamental reconnu par les lois de la République*) and as such had constitutional status that allowed the Council of State to rely on it to inform its interpretation of the Franco-Malian extradition agreement.²⁹⁷ By so doing, the Council of State, in effect, modified France's extradition treaty with Mali by incorporating into it a requirement of French law allowing France to refuse to comply with the express terms of the agreement. In *Koné*, however, the Council ultimately determined that even under the treaty, as interpreted in light of French norms with constitutional status, M. Koné was subject to extradition because Mali was not seeking his extradition for political ends.²⁹⁸

RAYMOND GOY, *DU DROIT INTERNE AU DROIT INTERNATIONAL: LE FACTEUR RELIGIEUX ET L'EXIGENCE DES DROITS DE L'HOMME* (1998).

291. For an example of the application of Vienna Convention principles without explicit reference to the Convention itself, see *M. Zaidi*, CE, Apr. 21, 2000, Rec. Lebon 159. In a recent decision, the Administrative Court of Appeals of Lyon referred to the treaty interpretation provisions of the Vienna Convention. *Ministre du budget c. Mehyaoui*, CA Lyon, Oct. 1, 2003. In an earlier phase of this case, however, the Council of State did not refer to the Vienna Convention, nor to any other principles of interpretation. *Mehyaoui*, CE, Apr. 27, 2001, Rec. Lebon.

292. DAILLIER & PELLET, *supra* note 20, at 238-39.

293. DECAUX ET AL., *supra* note 20, at 269 (citing Docteur Subrini, CE Ass., July 11, 1984, Rec. Lebon 259). For a discussion rejecting the binding effect of interpretations of the European Convention on Human Rights by the ECHR, see Bruno Genevois, *Conclusions de Bruno Genevois, Commissaire du Gouvernement, in Docteur S [Subrini]*, 1985 Rec. Dalloz, Jurisprudence, at 150, 152-53. In his *conclusions*, M. Genevois directs the Council of State's attention to Article 5 of the French Civil Code, which provides: "Judges are forbidden to decide by way of a general and rule-making decision the cases submitted to them." C. CIV. art. 5. In its important *Aquarone* decision, the Council of State refused to accept an interpretation of customary international law by the International Court of Justice. CE, June 6, 1997, Rec. Lebon 206.

294. See, e.g., *M. Bitouzet*, CE, July 3, 1998, Rec. Lebon 288. For a discussion of *M. Bitouzet*, see *infra* notes 304-12 and accompanying text.

295. *Koné*, CE Ass., July 3, 1996, Rec. Lebon 255; see also LONG ET AL., *supra* note 211, at 777.

296. *Id.*

297. *Id.*

298. *Id.*

In recent years French courts have shown themselves increasingly willing to interpret French statutes so as to adapt French law to decisions of the ECHR. A recent example is the Council of State's 1998 decision in *M. Bitouzet*.²⁹⁹ In that case the Council of State was called upon to apply an Article in the Urban Code relating to indemnities.³⁰⁰ Certain land owned by M. Bitouzet, classified as within a "housing zone" when he acquired it, was reclassified as "non-buildable" as part of an inter-communal land use plan.³⁰¹ M. Bitouzet sought indemnification from the state for the loss in value of his property as a result of the reclassification.³⁰² The relevant provision of the Urban Code, however, denied indemnity in such situations, subject to two narrow exceptions.³⁰³ The Administrative Tribunal of Versailles rejected M. Bitouzet's claim.³⁰⁴ On appeal to the Council of State, M. Bitouzet argued that the provision of the Urban Code, as applied, violated Article 1 of the First Additional Protocol to the European Convention, especially in light of a series of decisions rendered by the ECHR.³⁰⁵ After analyzing the requirements of Article 1 of the Additional Protocol in light of these decisions, the Council of State looked to the provision of the Urban Code at issue, and concluded that if interpreted in a certain way it would be compatible with those requirements.³⁰⁶ The Council of State then read the Urban Code as incorporating those requirements, thus, in effect conforming the French law to France's treaty obligations as determined by reference to decisions of the European Court of Justice.³⁰⁷

Interpretation has also allowed the Council of State to resolve questions concerning the incompatibility of provisions in different treaties, despite its inability to examine the validity of treaty provisions with respect to provisions in another treaty.³⁰⁸ In a 2000 decision, it explicitly referred to international law rules for the interpretation of treaties and adopted an approach to dealing with the incompatibility of treaty provisions: "in the case of conflict between more than one international obligation, we must determine how each is to be applied according to its terms and

299. *M. Bitouzet*, CE, July 3, 1998, Rec. Lebon 288; see also Ronny Abraham, *La non-indemnisation des servitudes d'urbanisme au regard de la Convention européenne des droits de l'homme, Conclusions sur Conseil d'État, Section, 3 juillet 1998, M. Bitouzet*, 14 R.F.D.A. 1243 (Nov.-Dec. 1998). Another example of the increasing influence of the European Convention in areas outside of human rights is *SA Banque internationale pour le commerce et l'industrie de la Guinée v. SARL Gregori international* (pourvoi no. 00-21.591) (allowing a foreign business entity to bring suit despite an 1857 law that would have required a prior authorization by decree).

300. *M. Bitouzet*, CE, July 3, 1998, Rec. Lebon 288.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Convention franco-allemande d'entraide judiciaire*, CC decision no. 80-116DC, July 17, 1980, Rec. 36; *Association Gurekin et Coordination des comités de soutien aux prisonniers politiques basques*, CE, July 30, 2003, Rec. Lebon, req. no. 237649.

according to the principles of customary international law”³⁰⁹ If the incompatibility cannot be resolved by interpretation, the later treaty governs.

In recent situations where fundamental values of the French judicial process were at stake, however, the response of French courts to decisions of the ECHR interpreting the European Convention has been less cooperative. In *Reinhardt and Slimane-Kaïd v. France*³¹⁰ and in *Kress v. France*³¹¹ the ECHR held that certain aspects of appellate procedure before the Court of Cassation and the Council of State did not afford litigants the right to a “fair and public hearing” as guaranteed by Article 6(1) of the European Convention. At issue in those cases was the role of the *Commissaire du Gouvernement* in Council of State proceedings and that of the *Avocat général* in Court of Cassation proceedings. According to Professor Mitchell Lasser, the ECHR’s

jurisprudence compromises one of the great symbols of French national pride: its significant international legal legacy. Furthermore, that jurisprudence also tarnishes a particularly cherished French national icon: the judicial amicus at the Conseil d’État, the *commissaire du Gouvernement*. The CDG represents one of the most potent French symbols of the rule of law.³¹²

While the Court of Cassation sought to comply with the decision of the ECHR in *Reinhardt*, the Council of State has resisted implementing the reforms required by the *Kress* decision.³¹³ If the decisions of the ECHR and the response of French courts are to be regarded as an exchange in the “dialogue between courts,” Professor Lasser’s view is that it “has largely consisted of unfocused, vaguely uncomprehending accusations, and tepid, halfhearted responses.”³¹⁴ The Council of State’s reaction to the ECHR’s *Kress* decision can be instructively compared with U.S. courts’ reaction to the ICJ’s decisions in *LaGrand* and *Avena*. It is not so easy to jettison or significantly modify procedures that are seen as implementing core national values at the behest of an international tribunal interpreting a broadly-worded treaty provision that allows considerable discretion in its application.

F. The Requirement of Reciprocity

Article 55 of the French Constitution makes reciprocity a condition for the application of a treaty or agreement.³¹⁵ There are a number of questions that arise in applying the reciprocity requirement of Article 55 in practice.³¹⁶ First, does the condition of reciprocity apply to all treaties and international agreements (multilateral and bilateral; *traités-contrats*, *traités-lois*, and *traités communautaires*) or only to

309. Zaïdi, CE, Apr. 21, 2000, Rec. Lebon 159 (my translation); see also Julien Cazala, Nicolas Jambon & Myriam Maunoury, *Jurisprudence française relative au droit international (Année 2003)*, 50 A.F.D.I. 876, 883 (2004).

310. 1998-II Eur. Ct. H.R. 640.

311. 2001-VI Eur. Ct. H.R. 1, 26.

312. Lasser, *supra* note 9, at 1034; see also OLIVIER DUTHEILLE DE LAMOTHE & MARIE-AIMÉE LATOURNERIE, *L’INFLUENCE INTERNATIONALE DU DROIT FRANÇAIS* (2001) (cited by Professor Lasser).

313. Lasser, *supra* note 9, at 1047-51.

314. *Id.* at 999.

315. 1958 CONST. art. 55; see generally ABRAHAM, *supra* note 1, at 82-88.

316. ABRAHAM, *supra* note 1, at 82-88; see also COMBACAU & SUR, *supra* note 20, at 191-92.

some of them?³¹⁷ Second, what are the legal consequences of an absence of reciprocity—to deprive the treaty or agreement of all legal value, or simply to deny it priority over a law? Third, is reciprocity to be evaluated by reference to the entire treaty or agreement or with reference to the particular provision in question? Finally, and perhaps the most critical question currently in light of the *Chevrol* litigation, what authority is to decide the reciprocity question? Is it a decision for the court or for the executive?

The Council of State takes the position that the reciprocity question is for the executive branch.³¹⁸ In its 1982 decision in *Rekhou*, the Council of State opined that “it is not for administrative tribunals to determine if and to what degree the conditions of execution by the other party to a treaty or agreement are of the nature to deprive the provisions of that treaty or agreement of the authority, which is accorded them under the Constitution.”³¹⁹ This is a question for the Ministry of Foreign Affairs, whose response to an inquiry from the tribunal is binding on it. In the *Rekhou* case the Council of State considered, and rejected, the proposition that the treaty or agreement should be applied by the administrative tribunal unless the French authority that had ratified or approved the treaty attested, in a published decision, that the application of the treaty or agreement in internal law was suspended.³²⁰ This approach, however, was subsequently adopted by the First Civil Chamber of the Court of Cassation.³²¹

In *Chevrol*, the Council of State reaffirmed the approach it took to the reciprocity question in *Rekhou* and subsequent cases.³²² Following its decisions in *Nicolo* and *G.I.S.T.I. (1990)* and the decision of the ECHR in *Beaumartin*, the Council of State might very well have used the *Chevrol* case as an opportunity to abandon its prior jurisprudence and to conform its approach to the determination of reciprocity to the new direction in which the law under Article 55 was moving. In fact, in his *conclusions* the *Commissaire du Gouvernement* reminded the Council of Article 6(1) of the European Convention and its prior decision in *G.I.S.T.I. (1990)* regarding the interpretation of treaties and international agreements.³²³ He then asked: “Should you

317. For example, in the case of some treaties, like the Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90, the requirement of reciprocity makes no sense. *Traité portant statut de la Cour pénale internationale*, CC, decision no. 98-408DC, Jan. 22, 1999, J.O. 1317. In a recent decision, *Cimpoesu*, CE, Feb. 15, 1999, Rec. Lebon 602, the Council of State did not require reciprocity to apply the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. The reciprocity requirement also does not apply to the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Confédération nationale des associations familiales catholiques*, CE Ass., Dec. 21, 1990, Rec. Lebon 368.

318. *Rekhou*, CE Ass., May 29, 1981, Rec. Lebon 220; *Mme Chevrol-Benkeddach*, CE Ass., Apr. 9, 1999.

319. *Rekhou*, CE Ass., May 29, 1981, Rec. Lebon 220 (my translation).

320. ABRAHAM, *supra* note 1, at 86.

321. *Kryla v. Dame Lisak*, Cass. 1e civ., Mar. 6, 1984, Bull. civ. I, 69.

322. Since the entry into force of the Constitution of 1958, there have been only four cases that have considered the question of the condition of reciprocity: *Rekhou*, CE Ass., May 29, 1981, Rec. Lebon 220; *Mme Chevrol-Benkeddach*, CE Ass., Apr. 9, 1999; *Ministre du Budget v. Mme Veuve Bellil*, CE Ass., May 29, 1981, Rec. Lebon; *Ministre du Budget v. Nguyen Van Gao*, Nov. 14, 1959, Rec. Lebon 77. See Fabien Raynaud & Pascale Fombour, *Chronique générale de jurisprudence administrative française*, A.J.D.A. 401, 402 (May 20, 1999).

323. R. Schwartz, *supra* note 256, at 792.

today put an end to the 'mutilation' of the judicial function . . . ? Should you give up the last interlocutory reference that exists with respect to the determination of reciprocity?"³²⁴

In analyzing this question, the *Commissaire du Gouvernement* pointed out that according to general principles of international law a state has the right to suspend the application of an international agreement in the case of a substantial violation by the other party or parties. Thus, the reciprocity requirement in Article 55 was not strictly necessary. Its inclusion led him to draw two conclusions: first, that Article 55 was intended in part to do away with the requirement of international law that the breach by the other party be substantial in order to suspend the application of a treaty, thus authorizing the suspension in internal law of an international agreement more easily than under general principles of international law; and, second, that by not providing a particular procedure for the suspension of an international agreement, the framers of Article 55 intended to leave to national authorities the greatest possible flexibility in suspending the operations of a treaty.³²⁵ But, even assuming these objectives, is an interlocutory reference to the Ministry of Foreign Affairs on the question of reciprocity permissible under Article 6(1) of the European Convention or compatible with the Council of State's prior decisions in *Nicolo* and *G.I.S.T.I. (1990)*?

The *Commissaire du Gouvernement* conceded that there is a clear distinction between the interpretation of a treaty and a decision on its reciprocal application: "The interpretation of a treaty is a legal question. The determination of reciprocity is essentially political."³²⁶ First, the facts necessary to determine whether the treaty or agreement is being applied by the other party may be difficult to ascertain, as they may be within the sole knowledge and control of the foreign state. Also, the decision to suspend application of a treaty or agreement is not automatic; it involves the exercise of discretion of a political nature as to whether or not to respond to non-application by the other party by suspending performance, and, if so, exactly how to respond.³²⁷ Treaties, especially bilateral ones, involve bargaining over their provisions. A particular provision may be compensation to one party for its concession for accepting another provision.³²⁸

In spite of the difference in nature between interpretation and application of the reciprocity requirement of Article 55, and notwithstanding certain practical difficulties in implementing his proposed solution,³²⁹ the *Commissaire du Gouvernement* nevertheless recommended that the Council of State break from its former jurisprudence and apply treaties and international agreements unless their application

324. *Id.* at 793 (my translation).

325. *Id.* at 799-800; see also Raynaud & Fombeur, *supra* note 322, at 403-04.

326. R. Schwartz, *supra* note 256, at 804 (my translation).

327. For a U.S. case highlighting the political nature of the decision to suspend or abrogate the performance of a bilateral treaty, see *Charlton v. Kelly*, 229 U.S. 447 (1913) (applying U.S.-Italian extradition treaty to extradite U.S. national to Italy, even though Italy refused to extradite Italian nationals to U.S.).

328. R. Schwartz, *supra* note 256, at 805-06.

329. For instance, the Ministry of Foreign Affairs would have to monitor compliance with several thousand treaties and international agreements to which France is a party for reciprocal application and publish its decisions to suspend application of those treaties and agreements that it deemed were not being applied by the other party.

had been previously suspended by executive authorities.³³⁰ While this solution still leaves the determination of reciprocal application in the hands of a political branch of government, it has the virtue of requiring a rule-making type decision, made prior to particular litigation, which the court then implements in specific cases. Thus, this procedure would be much less vulnerable to challenge as violating Article 6(1) of the European Convention. Significantly, however, the *Commissaire du Gouvernement* suggested that a decision by the Council to adhere to its existing jurisprudence would not be inappropriate, since “in the context of dialogue between courts, it is possible to maintain a position inherently subject to debate.”³³¹

G. The Hierarchical Status of Treaties and International Agreements

What is a French court to do if a consensual obligation contained in a treaty or international agreement conflicts with a provision of domestic law?

1. The Constitution³³²

Article 55 specifically addresses the question of conflicts between a treaty or agreement and an act of Parliament. But it says nothing about conflicts between a treaty or international agreement and a provision of the Constitution or a rule of law with constitutional status (*bloc de constitutionnalité*).³³³ Although the Constitutional Council decided in 1975 that treaties are not part of the *bloc de constitutionnalité*,³³⁴ this does not necessarily mean that they are inferior to the Constitution.³³⁵ The Constitutional Council's 1975 decision left two questions unanswered. First, what is

330. R. Schwartz, *supra* note 256.

331. *Id.* at 811 (my translation).

332. Aspects of this question have already been considered. *See supra*, notes 251-54 and accompanying text (discussing Article 54 of the Constitution, which accords jurisdiction to the Constitutional Council to examine international commitments for their conformity to the Constitution before their ratification or approval) and notes 300-02 and accompanying text (discussing the *Koné* decision of the Council of State, which, by using a principle of French law with constitutional status to interpret a provision in an international agreement, in effect accorded primacy to the Constitution over the agreement).

333. Besides the express provisions of the Constitution of 1958, other rules of law have constitutional status. These rules are part of the so-called *bloc de constitutionnalité*, which derives from the Preamble to the Constitution of 1958:

The French people solemnly proclaim their attachment to the Rights of Man and to the principles of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the Constitution of 1946, and the rights and obligations defined by the Charter of the Environment of 2004.

1958 CONST. pmbl. (my translation).

In addition to according constitutional status to the texts therein referenced, the Preamble accords constitutional status to “the fundamental principles recognized by the laws of the Republic,” which language appears in the Preamble to the Constitution of 1946. *See generally* *Liberté d'Association*, CC decision no. 71-44DC, July 16, 1971. Rec. 29; JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 64-73 (1992); FAVOREAU & PHILIP, *supra* note 204, at 238.

334. *Loi sur interruption volontaire de grossesse I*, CC decision no. 74-54DC, Jan. 15, 1975, Rec. 19; *see also* FAVOREAU & PHILIP, *supra* note 204, at 300-27. The Constitutional Council's decision not to include treaties in the *bloc de constitutionnalité* had to do principally with its view that it was not within its competence to evaluate Acts of Parliament for conformity to treaty provisions.

335. COMBACAU & SUR, *supra* note 20, at 198.

the relative hierarchical status of constitutional norms and provisions in treaties and international agreements?³³⁶ Second, is a particular judicial authority competent to enforce that hierarchy in actual cases that come before it? Several recent decisions speak to these issues.

While it might appear self-evident that the Constitution is supreme in the domestic legal order, decisions of the European Court of Justice with respect to European community law assert the supremacy of community law over all national law, even national law with constitutional status.³³⁷ At least in the area of EU law then, the question of the hierarchical standing of treaty law and French law with constitutional status is problematic. Moreover, if it is possible that community law might take precedence over French law with constitutional status, might this principle also be applicable to the European Convention on Human Rights and to other French international obligations?³³⁸

In its 1998 decision in *Sarran*,³³⁹ the Council of State confronted the question of a conflict between a provision of the Constitution and a contrary stipulation in a number of international agreements. *Sarran* involved the organization of a vote in the French territory of New Caledonia for the people there to express their opinion on the Nouméa Accords of May 5, 1998.³⁴⁰ Article 76 of the Constitution provided that those persons fulfilling the conditions of a 1988 law (which required a ten-year residence) would be allowed to participate in the ballot.³⁴¹ Article 76 also provided that the measures necessary for the organization of the ballot would be taken by decree in the Council of State.³⁴² A decree pursuant to this provision was challenged by residents of New Caledonia who did not meet the ten-year residency requirement.³⁴³ They

336. Subsequently, the Constitutional Council has clearly stated that the place of the French Constitution is "at the summit of the internal legal order." *Traité établissant une Constitution pour l'Europe*, CC decision no. 2004-505DC, Nov. 24, 2004, J.O., at para. 10 (my translation).

337. *See, e.g., The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, Case C-213/89, 1990 E.C.R. I-2433.

338. In its decision in *Missouri v. Holland*, 252 U.S. 416, 433 (1920), the United States Supreme Court contrasted treaties, which are the supreme law of the land "when made under the authority of the United States," and acts of Congress, which are the supreme law of the land "when made in pursuance of the Constitution," thereby possibly implying that treaties need not conform to the Constitution. In its decision in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936), the Court said that "the investment of the federal government with the powers of external sovereignty [including the power to make such international agreements as do not constitute treaties in the constitutional sense] did not depend upon the affirmative grants of the Constitution," thereby also implying that certain international agreements need not conform to the Constitution. These interpretations were firmly rejected by the Court in *Reid v. Covert*, 354 U.S. 1 (1957):

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution . . . [N]o agreement with a foreign nation can confer power on the Congress or on any other branch of Government which is free from the restraints of the Constitution.

Id. at 5-6, 16.

339. *Sarran, Levacher et autres*, CE Ass., Oct. 30, 1998, Rec. Lebon 368; *reprinted in*, LONG ET AL., *supra* note 211, at 818.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

argued, in part, that the restricted electorate violated several international obligations undertaken by France, specifically certain provisions of the United Nations Convention on Civil and Political Rights, the European Convention on Human Rights, and Protocol No. 1 to the European Convention.³⁴⁴ In rejecting this argument, the Council of State said:

[A]lthough Article 55 of the Constitution provides that “treaties or agreements duly ratified or approved, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party,” the priority thus conferred to international engagements is not applicable, in the internal legal order, to provisions of a constitutional nature; therefore, the argument that the decree under attack would violate the stipulations of international obligations duly incorporated into the internal legal order and would for that reason be contrary to Article 55 of the Constitution must be rejected.³⁴⁵

Sarran, then, adopts the proposition that the Constitution is supreme law, at least in the French internal legal order. The Council of State in *Sarran* did not base its decision on its lack of competence to look past norms to apply treaty provisions that conflict with those norms (the *Constitution-écran* theory), and in that way finesse the question of the relative hierarchical status of constitutional norms and treaties. Rather, it simply accorded hierarchical priority to the Constitution. Moreover, the challenged measure in *Sarran* was a decree adopted pursuant to a law. In according constitutional status to the law and the decree—both subordinate legal acts—rather than evaluating them simply as law and decree, the Council of State effectively exempted them from the operation of Article 55.³⁴⁶ But, by stating that the Constitution has priority over international agreements *in the internal legal order* only, the Council of State recognized the principle of international law that a state “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”³⁴⁷

It has been suggested that the Council of State might have found a constitutionally-based rationale for according priority to an international agreement over a contrary constitutional provision in the Preamble to the Constitution of 1946, itself part of the *bloc de constitutionnalité*, which provides: “Faithful to its traditions, the French Republic conforms to the rules of public international law.”³⁴⁸ The Council of State, however, regards this provision as incorporating international law into the domestic legal order, but not according it priority over conflicting norms of domestic law.³⁴⁹ The Council of State in *Sarran* also rejected petitioners’ argument that Article 76, by incorporating by reference “the conditions specified in Article 2 of *Law No. 88-1028* of November 9, 1988”³⁵⁰ conflicted with other norms with constitutional status;

344. *Id.*

345. *Id.* (my translation).

346. *Id.*

347. Vienna Convention on the Law of Treaties, art. 27.

348. LONG ET AL., *supra* note 211, at 822.

349. Aquarone, CE Ass., June 6, 1997, Rec. Lebon 206. For an analogous decision in American law, see *The Paquete Habana*, 175 U.S. 677 (1900) (recognizing international law as the law of the land, but not according it priority over domestic law).

350. *Sarran*, Levacher et autres, CE Ass., Oct. 30, 1998, Rec. Lebon 368; *reprinted in*, LONG ET AL., *supra* note 211, at 818.

namely, Article 3 of the Constitution, which guarantees equality in suffrage, and Article 6 of the Declaration of the Rights of Man and the Citizen of 1789, which guarantees legal equality generally.³⁵¹ It held that it was the intention of Article 76 to derogate from other norms of constitutional status concerning the right of suffrage.³⁵²

The Council of State reaffirmed its *Sarran* decision in a case concerning EU law and the European Convention on Human Rights law in 2001. In *Syndicat national des industries pharmaceutiques (SNIP)* petitioner raised objections to the imposition of a tax.³⁵³ Petitioner's objections were based on EU law, a decision of the European Court of Justice, Article 6(1) of the European Convention on Human Rights, and Article 1 of the first additional protocol to the European Convention.³⁵⁴ In a statement unnecessary to its holding (an *obiter dictum*), the Council of State said that the principle of the primacy of EU law "does not lead, in the internal legal order, to allowing a challenge to the supremacy of the Constitution."³⁵⁵ This statement, totally unnecessary for the decision, has been characterized as a mark of "doctrinal militancy,"³⁵⁶ but it clearly stakes out the Council of State's position that the Constitution is supreme in the French legal system, not only with respect to ordinary international engagements, but also with respect to EU law.³⁵⁷ According the Constitution supremacy over the international obligations of France may create problems from the perspective of France's participation in the new international legal order represented by an increasingly dense network of treaties and international agreements requiring more frequent application by national judicial authorities and more active international tribunals to interpret and enforce some of them.³⁵⁸ To the extent that the Council of State's *obiter dictum* is addressed to the institutions of the EU or to the ECHR, however, it may perhaps be taken as an indication to them that they must seriously consider the French Constitution and other components of the *bloc de constitutionnalité* in enacting legislation and deciding cases.

In 2000, the Court of Cassation in *Fraisse* considered the question of the hierarchical relationship between the Constitution and international obligations and reached the same conclusion as the Council of State in *Sarran*.³⁵⁹ The Plenary Assembly of the Court of Cassation stated:

351. *Id.*

352. *Id.*

353. *Syndicat national des industries pharmaceutiques*, CE, Dec. 3, 2001, Rec. Lebon 624.

354. *Id.*

355. *Id.* (my translation).

356. Rigaux & Simon, *Note on SNIP*, EUROPE (No. 4 2002), at 7; see also Maziau, *supra* note 240, at 734-35.

357. For a critical commentary on these decisions, see Dominique Carreau, RÉPERTOIRE DALLOZ DE DROIT INTERNATIONAL: CAHIERS DE L'ACTUALITÉ (Jan. 2005), at 3-4; see also *Traité établissant une Constitution pour l'Europe*, CC, decision no. 2004-505DC, Nov. 19, 2004, Rec. 173 (indicating that if the primacy of EU law over internal law flows from Article 88-1 of the Constitution, primacy of EU law does not apply where express provisions of the Constitution are involved.)

358. One writer refers to these developments as "the internationalization of law." Bonnet, *supra* note 195, at 58.

359. *Fraisse*, Cass. ass. plén., June 2, 2000; see Alain Ondoua, *La Cour de Cassation et la place respective de la Constitution et des traités dans la hiérarchie des normes*, 104 R.G.D.I.P. 985 (2000); Anne Rigaux & Denys Simon, *Droit communautaire et constitution française: une avancée significative de la Cour de Cassation. À propos de l'arrêt Fraisse du 2 juin 2000*, EUROPE (Aug.-Sep. 2000), at 3.

[Considering that] the supremacy conferred on international engagements [by Article 55 of the Constitution] does not apply, in the internal legal order, to provisions with constitutional value, the argument that the provisions of Article 188 of the organic law . . . are contrary to the International Convention on Civil and Political Rights and to the European Convention for the Protection of Human Rights and Fundamental Freedoms must be rejected.³⁶⁰

The Constitutional Council has also followed the lead of the Council of State in *Sarran* and the Court of Cassation in *Fraisse*.³⁶¹

In a recent decision, *Mlle Deprez et M. Baillard*,³⁶² the Council of State indicated that, from its perspective, the relationship between international and internal legal orders must be determined by the court's application of Article 55: "for the implementation of the principle of the superiority of treaties over the law dictated by Article 55, it is the responsibility of the court, in determining which text it must apply, to follow the rule for conflict of norms established by that Article."³⁶³ While this statement might appear to follow inexorably from the text of Article 55 itself, it must be read in light of the Council of State's recent decisions in *Koné*, *Sarran*, and *SNIP*, where the Council endorsed the notion that the Constitution occupied a superior position in the hierarchical status of norms in the French legal order. By stressing its institutional competence under Article 55, rather than baldly asserting the inherent hierarchical status of the French Constitution, the Council of State may have been seeking to soften its position with respect to France's obligations flowing from the European Convention on Human Rights and therefore to present its reconciliation of conflicting norms in a "less conflictual, more harmonious" manner.³⁶⁴

2. Legislative Acts

Article 55 of the Constitution clearly accords priority to treaties and international agreements over laws. When confronted with a possible conflict between a law and a provision of a treaty, however, French judges attempt to resolve it by interpreting the treaty and the law harmoniously.³⁶⁵ Thus, for an international obligation to displace a domestic law, the international norm and the national norm must both apply to the situation in question,³⁶⁶ and, if they do, they are not subject to an interpretation that

360. *Fraisse*, Cass. ass. plén., June 2, 2000 (my translation).

361. *See, e.g.*, Loi pour la confiance dans l'économie numérique, CC decision no. 2004-496DC, June 10, 2004, J.O. p. 11182; Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel et modifiant la loi No. 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, CC decision no. 2004-499DC, July 29, 2004.

362. *Mlle Deprez et M. Baillard*, CE, Jan. 5, 2005, Rec. Lebon 1. Petitioners demanded the annulment of certain provisions of a decree on road safety and a 1999 amendment to the Code of Criminal Procedure on the ground that these provisions violated Article 6(1) of the European Convention. *Id.* Petitioners also advanced a number of arguments based on internal French law. *Id.*

363. *Id.* (my translation).

364. Bonnet, *supra* note 195, at 64. Bonnet also suggests that the Council of State may regard the hierarchical principle as inappropriate to the management of the relationship between internal law and international law. *Id.* at 65.

365. Conclusions of Procureur général Matter, Sanchez, Cass. civ., Dec. 22, 1931. S.1932.1.257.

366. *See, e.g.*, Sabatino, CE, June 29, 1998, Rec. Lebon 960 (an international convention and a domestic

avoids conflict.³⁶⁷ Also, in order to benefit from the priority accorded by Article 55, except in cases where the provisions of the convention implicate international relations (*d'ordre public*), the litigant must affirmatively request the trial judge to apply the rules or principles of the convention instead of the conflicting law. If the litigant fails to do so, he may not later invoke contrary provisions of the convention before the Court of Cassation.³⁶⁸

If there is a clear conflict between a treaty and a law and the question is properly raised, the traditional French solution was to accord priority to the one that was the most recent. It would appear, however, that Article 55 had altered this approach, since it recognizes the priority of treaties and international agreements over laws. The problem for French courts in according preference to a treaty over a law stems from the principle of separation of powers, which prohibits judges from refusing to apply legislative enactments.³⁶⁹ The function of the judge is to apply the law. Even though it might be argued that the hierarchy of norms established by Article 55 has constitutional status, French courts, both judicial and administrative, are not competent to apply constitutional norms to the detriment of a law. This is the famous doctrine of the law-screen (*loi-écran*), whereby the law prevents the judge from looking beyond it to the Constitution.³⁷⁰

The leading cases of conflict between treaty obligations and laws are the Court of Cassation's decision in *Jacques Vabre*³⁷¹ and the Council of State's decision in *Nicolo*.³⁷² The Court of Cassation in *Jacques Vabre* and the Council of State in *Nicolo* firmly laid to rest the classic French solution to the problem (which accorded priority to the most recent source) by according priority to an international treaty obligation over a subsequently enacted French law. Although both cases involved conflicts between French statutes and provisions of European Community treaty law, they both relied on Article 55 to accord priority to the international norm in question. The resolution of those cases by the Court of Cassation and the Council of State rested on a reading of Article 55 that it implicitly authorizes courts to enforce the hierarchy of norms it establishes by refusing to apply a law.³⁷³ Their holdings, therefore, are applicable to all conflicts between international obligations and domestic statute law.

law both applied to the same matter, extradition, but the law contained additional provisions that did not conflict with the convention). A treaty and a law may apply to the same situation, but the law may include a provision that its application is "subject to international agreements"; or, even if the law does not include such a provision expressly, a court may assume that the legislature was cognizant of Article 55 when it enacted the law and intended to respect it. ABRAHAM, *supra* note 1, at 107-08.

367. See, e.g., X v. CAF de la Seine-Saint-Denis, Cass. soc., Jan. 22, 1998, Bull. civ. V, No. 31 (a provision of a general nature in an international convention interpreted by reference to specific provisions of a domestic law).

368. X, Cass. 1e civ., Feb. 3, 1998, Bull. civ. I, No. 43.

369. Article 10 of the law of August 16-24, 1790, provides: "Courts shall not take directly or indirectly any part in the exercise of the legislative power, nor prevent or suspend the execution of . . ." laws promulgated by the President of the Republic.

370. See *supra* text accompanying note 246.

371. Administration des Douanes v. Société Cafés Jacques Vabre, Cass. ch. mixte, May 24, 1975, D. 1975, 497; see also *supra* notes 222-24 and accompanying text.

372. Nicolo, CE Ass., Oct. 20, 1989, Rec. Lebon 190; see also *supra* notes 217-19 and accompanying text.

373. ABRAHAM, *supra* note 1, at 110-11.

Although both decisions accorded priority to a treaty obligation over a subsequently enacted internal law, the application of that principle, outside of the domain of EU law, has on occasion proved somewhat problematic.

For example, the *Schneider* decision of 2002 of the Council of State³⁷⁴ involved a conflict between provisions of a French tax law and a 1966 Franco-Swiss treaty for the avoidance of double taxation. In that case the Council of State had to determine whether the imposition of a tax by France on a French corporation for the income of its Swiss subsidiary was contrary to a provision of the 1966 treaty.³⁷⁵ Since that same income was subject to taxation in Switzerland, if it were also taxed by France, it would be subject to double taxation. The first step in the analysis was to determine whether the French corporation was liable for the tax imposed under French domestic law. If it was, the next step was to determine whether the treaty purported to govern the matter in controversy, that is, whether the law came within the field of application (*champ d'application*) of the treaty. As far as tax treaties are concerned, French courts regard them as “distinctive” in that they have a “subsidiary character”: the superior authority that Article 55 of the Constitution confers on international engagements over laws can come into play only to the extent that both the law and the treaty are susceptible to being applied.³⁷⁶ In determining whether the Franco-Swiss treaty applied, the Council of State engaged in a highly limiting, literal, and restrictive interpretation of its Article 7(1), which provided that “the income of an enterprise of a contracting State is only taxable in that State, unless the enterprise carries on its activity in the other contracting State through a permanent establishment, which is situated there.”³⁷⁷ Rather than considering the object and purpose of the treaty and the larger context of the issue presented, the Council of State interpreted the word “income” solely by reference to the French tax code, which resulted in the non-application of the treaty provision in question.³⁷⁸

[T]he *Schneider* decision seems . . . to represent the recent tendency of the Council of State to show itself more reticent in the affirmation of a full recognition of the consequences of the primacy of treaties over laws The High Court comes across as more deferential vis-à-vis the legislature in the application of the superiority of international norms over the laws . . . [and] seems to betoken a certain “autolimitation” on the part of administrative tribunals in their scrutiny of conformity to treaty standards (*conventionnalité*).³⁷⁹

374. *Ministre de l'Économie, des Finances et de l'Industrie v. Société Schneider Electric*, CE Ass., June 28, 2002, Rec. Lebon 234.

375. *Id.*

376. *J. Arrighi di Casanova*, Conclusions, Memmi, CE, March 17, 1993, Rec. Lebon, req. no. 85894.

377. *Ministre de l'Économie, des Finances et de l'Industrie v. Société Schneider Electric*, CE Ass., June 28, 2002, Rec. Lebon 23 (my translation).

378. *Id.*

379. *Maziaiu*, *supra* note 240, at 707-08 (my translation). It should be noted that in deciding tax cases, the judge sits as a “*juge de l'impôt*,” in which capacity he tends to be more severe. See generally LUDOVIC AYRAULT, *LE CONTRÔLE JURIDICTIONNEL DE LA RÉGULARITÉ DE LA PROCÉDURE D'IMPOSITION* (2004).

3. Administrative Acts

Article 55 also accords priority to treaties and international agreements over administrative acts, including decrees and ordinances made pursuant to legislative authorization.³⁸⁰ This is significant in the French system because the government possesses an autonomous, constitutionally-based regulatory authority, pursuant to which it can make rules with respect to matters that do not “fall within the domain of law,”³⁸¹ and it is often authorized by Parliament “to take measures by ordinance that are normally within the domain of law.”³⁸² Many matters that are dealt with by congressional legislation in the United States fall within the domain of the government’s autonomous regulatory power in France, or are dealt with by government ordinance. Thus, a vast corpus of government regulatory and legislative-type enactments are subordinated to international obligations and do not rise to the level of “laws,” with their quasi-sacrosanct status in the French legal order.

H. The Application of the Decisions of International Tribunals by French Courts

The second *Chevrol* case before the Council of State presented it with the question of giving effect to the decision of an international tribunal, the ECHR. As discussed earlier,³⁸³ the Council of State denied Mme Chevrol’s request to reopen her case on the basis of the European Court’s decision.

During the past decade, the French legal system has become thoroughly enmeshed with the European human rights system. From 1996 through 1998, for instance, alleged violations of the European Convention were raised by petitioners before the Council of State in an average of 529 cases per year.³⁸⁴ Moreover, during recent years France has been a frequent respondent in proceedings before the European Court for Human Rights.³⁸⁵ Because of the considerable experience of French courts in dealing with decisions of the ECHR and their lack of significant recent experience with the decisions of other international tribunals, this Article will consider only the applicability of decisions of the ECHR in French courts.

Article 46 of the European Convention provides that “[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”³⁸⁶ In the opinion of *Commissaire du Gouvernement Bachelier* in *Mme Chevrol*, if the Council of State decided that it was “legally bound” by an

380. See ABRAHAM, *supra* note 1, at 100-03; DAILLIER & PELLET, *supra* note 20, at 291.

381. 1958 CONST. art. 37.

382. 1958 CONST. art. 38.

383. See *supra* Part III.A.

384. Andriantsimbazovina & Sermet, *supra* note 9, at 799-800 (remarking that these numbers attest to the utter commonplace of the European Convention in the jurisprudence of the Council of State).

385. Dupré, *supra* note 9, at 313. France ratified the European Convention in 1974 and accepted the right of individual petition in 1981. The Court of Cassation recognized that the provisions of the Convention were directly applicable in decisions in 1975 and 1976: Respino, Cass. crim., June 3, 1975, Bull. crim., no. 141; Glaeser-Touvier, Cass. crim. June 30, 1976, Bull. crim., No. 236. The Council of State recognized the direct applicability in 1990 in Confédération nationale des associations familiales catholiques et autres, CE Ass., Dec. 21, 1990, Rec. Lebon 369.

386. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 46(1), Nov. 4, 1950, 312 U.N.T.S. 221, amended by Protocol No. 11, Europ. T.S. 155.

interpretation of the European Court, it would be reversing the position it has taken in prior litigation.³⁸⁷

As for the enforcement of ECHR decisions in specific cases in the absence of express legislation to do so, the record of French courts is decidedly mixed. The *Chevrol* case is a good example. In that case the Council of State refused to reopen or reconsider its first *Chevrol* decision.³⁸⁸ Another example is the Council of State's 1997 decision in *Amibu, Inc.*³⁸⁹ In that case, petitioner, Amibu Inc., sought to suppress documentary evidence seized by customs authorities from the two principals of the corporation, M. and Mme Mialhe, in a later tax proceeding.³⁹⁰ Petitioner asserted that the seizure had already been declared to be in violation of Article 8 of the European Convention by the ECHR in a proceeding involving the Mialhes³⁹¹ and that that decision should preclude the use of seized evidence in the tax proceeding against the corporation. The Administrative Court of Appeals agreed with petitioner's contention, but its decision was quashed by the Council of State.³⁹² The French tax authorities argued that the European Court's decision determined only that a specific provision of the European Convention was violated in respect to certain individuals.³⁹³ It did not extend to invalidating the seizure of the documents *erga omnes*. The European Court's decision was based on the Mialhe's right to privacy; it did not necessarily decide that Amibu Inc. had the same right under Article 8 of the European Convention in the circumstances of the seizure. Petitioner asserted that the government's position was "ultranationalist" and that it would assure the "systematic preponderance of the national judge in the interpretation and application of the [European] Convention."³⁹⁴

IV. CONCLUSION

Over the past fifteen years, since the decision of the Council of State in the *Nicolo* case, France has moved steadily in the direction of effectively incorporating treaties and international agreements into its domestic legal order, and in adapting French law to the decisions of international tribunals.³⁹⁵ In so doing, its courts have developed principles and procedures, firmly grounded in or justified by authoritative texts, which reflect and respect French constitutional and jurisprudential values, while at the same

387. M. Bachelier, *Conclusions de M. Bachelier, Commissaire du Gouvernement*, 103 R.G.D.I.P. 560 (1999) (citing Docteur Subrini).

388. See *supra* Part III.A.

389. *Amibu, Inc.*, CE, Nov. 24, 1997, Rec. Lebon, req. no. 171,929.

390. *Id.*

391. *Mialhe v. France*, 256-C Eur. Ct. H.R. (ser. A) (1993).

392. *Amibu, Inc.*, CE, Nov. 24, 1997, Rec. Lebon, req. no. 171,929.

393. *Id.*

394. *Conclusions de M. le Commissaire du Gouvernement G. Bachelier*, reprinted in *Autorité de la chose jugée, L'arrêt de la Cour européenne des droits de l'Homme déclarant irrégulière une saisie de pièces n'a pas d'incidence sur la procédure suivie devant le juge de l'impôt*, 1998 REVUE DE DROIT FISCAL 278, 279 (my translation). See also Ludovic Ayrault, *Le volet civil de l'article 6-1 et le droit fiscal au lendemain de l'arrêt: Cass., 12 juillet 2004*, Consorts Pelat, in L'ANNÉE FISCALE: DÉBATS, ÉTUDES, CHRONIQUES 195 (2005).

395. For a discussion of the importance of the incorporation of the European Convention into French law and the role of the European Court of Human Rights in moving France in the direction of a modern "rule of law" state, see ROBERT BADINTER, L'ABOLITION 223-24 (2000).

time allowing France to fulfill its international legal obligations in good faith. France's monist view of its Constitution has certainly contributed to these developments. It has been a significant factor in providing a principled foundation and legal orientation for recommendations made by *commissaires du gouvernement* to the Council of State and for decisions of French courts as well.

United States courts, however, over roughly the same period, have been less receptive to the international legal obligations of the United States assumed by treaty or international agreement. What appears to be a concern for preserving unencumbered the decision-making prerogatives of all branches of government (legislative, executive, and judicial) has given rise to the propensity of American courts to reject or restrict application of provisions of treaties and international agreements. Although not articulated as such, the approach of American courts has followed the dualistic model, even though the Constitution may very well be read to allow, if not mandate, a monistic orientation.

Prevailing legal theory and judicial decisions are the products of and reflect, ultimately, their political environment. For the past several decades, the French government and political establishment have been strong supporters of supranational law and institutions.³⁹⁶ In the forefront of these developments, of course, is French support for European integration, with the necessary limitations on national sovereignty which that entails. France is also deeply committed to and enmeshed in the European human rights regime, strongly supports international organizations (like the United Nations and the International Criminal Court), and in general favors cooperative solutions to international problems (like international terrorism, arms control, or protection of the environment).³⁹⁷ France has amended its Constitution several times in order to participate in the increasing integration of Europe; it has amended its Constitution to enable it to become a party to the Statute of the International Criminal Court; it has assumed a variety of international obligations that have important internal implications; and it has enacted or interpreted domestic legislation to enable it to perform certain of these obligations and to implement certain decisions of international tribunals.

In this political environment, a monist conception of the relationship between international and internal legal orders seems natural and appropriate. And French legal scholars have obliged. Almost unanimously, they regard the Constitution as monist. They applaud the internationalist decisions of French courts and criticize those that they regard as not sufficiently responsive to international law. They elaborate theories, rationales, and doctrines for the advancement of the monist agenda. They allude frequently, and with approbation, to a new legal order and to a cooperative relationship (a "dialogue") between international and national tribunals.

396. French opinion with respect to the European project and other international involvements and commitments is certainly not univocal, as demonstrated most dramatically by France's recent rejection of a proposed Constitution for Europe, and the extremely narrow margin by which French voters approved ratification of the Treaty of Maastricht in 1992.

397. See, e.g., Constitutional Law No. 2005-205 of Mar. 1, 2005, J.O., Mar. 2, 2005 (incorporating Article 10 of the Charter of the Environment of 2004 into the French Constitution: "This Charter inspires the action of France at the European and international level.").

Decisions which they regard as manifesting dualist tendencies are criticized as regressive.

In the United States, political support for a nationalist orientation for diplomacy and law is ascendent. The internationalist perspective does not have a strong voice in positions of power, and the people, whatever their true feelings, are acquiescent in this point of view. The United States is not involved in close cooperative endeavors like the EU or the European human rights regime. To many of those treaty regimes that the United States does adhere, it does so with important reservations and with the understanding that the treaty is not self-executing. Federal court judges, most of whom have been appointed by the more nationalist-oriented administrations that have been in power during most of the period since 1981, have not been particularly receptive to the internationalist point of view.

While most American international legal scholars, like their French counterparts, favor international perspectives and are critical of the current restrictive trend in the decisions of United States courts regarding the application of international law and the decisions of international courts, there is an important and vocal minority that takes a different point of view. These scholars tend to view questions regarding the application of international law and the decisions of international tribunals from a national perspective; for instance, whether American democratic values are reflected in rule formulation or how application of international rules or decisions impact American federalism. The work of these scholars translates prevailing political attitudes into technical legal doctrine, and furnishes legal justification for nationalist-leaning decisions of courts in specific cases.³⁹⁸

All legal systems and rules of law exist within political and cultural contexts.³⁹⁹ With respect to many matters, particularly those that touch sensitive nerves, as do most questions of international law, it is the context, rather than the specific rule, that drives decision. To be more precise, it is the contextually-influenced interpretation of the specific rule that determines decision. Because the French and American contexts within which courts consider the application or non-application of provisions of international agreements and decisions of international tribunals differ so significantly today, it is no surprise that decisions regarding these matters differ also.

398. See generally Bradley & Goldsmith, *supra* note 114 (arguing that customary international law should not have the status of federal common law).

399. Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 ME. L. REV. ____ (2006).

EXORBITANT JURISDICTION

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