Kyce Siddiqi, Esq.

International Law in US Courts; The Alien Tort Claims Act

It should be noted from the outset that the rationale for US Courts to look at international law arguably centers on neo-functionalism; it is utilizing comparativism as a tool - identifying and learning from the problems in other countries. There is also another rationale based on the "idea of peers," where we have a transjudicial dialogue which departs from a state centered approach. At one time, the United States always had a "we the people" attitude, and a unilateral export of the law – not import. However, ever since the *Paquette Habana* case, the Supreme Court has demonstrated a willingness to cite to European courts and international law scholars, as well as relying on foreign law and practice. For instance, in *Roper v. Simmons*, the court looks into international conventions relating to children, and relied on foreign law to prevent execution of juveniles.

Indeed, the United States can be viewed as being both monist and dualist. While the scope of the treaty power has not been defined, the Supremacy Clause of the US Constitution declares that treaties shall be the "supreme law of the land." US Courts often seek to minimize any conflict between US Law and International Law by adhering to the later in time rule. Yet there are instances where international legal norms are palpably inconsistent with certain domestic US laws. This was most evident in a series of consular notification cases (also known as the *Medellin* cases) involving US breaches of the Vienna Convention, as Article 27 provides that a nation may not invoke provisions of its internal law as a justification for its failure to comply to with a treaty.

The cases brought attention the relationship between the Vienna Convention and how the treaty relates to a matter that is under the purview of state law (criminal law), and the relationship between the executive branch and the judiciary. It should be noted that the

Convention created not only rights for the state but also human rights as was seen in the first of the several consular cases, *Paraguay v. Gilmore*. There, the state brought a suit on behalf of an individual claiming that the rights not only pertain to Paraguay but also to him, suggesting that the primary actor is not solely the state. Adding to this notion, the *LaGrand* case further underscores the normativity of the consular relations rights and how foreign states are asking for redress for its citizens. Reparations (the traditional form of redress) was not enough; rather the appropriate measure according to the ICJ is the future enforcement of *individual* rights, as the ICJ explained that there were human rights at stake.

The *Avena* case similarly adds to the debate between the state centricity approach and individual rights. The *Avena* case suggests that there is a constitutionalization in the sense that there are issues that raise rights and claims that go beyond the state. The ICJ in *Avena* indicated that the harm is not just experienced by the state, but also by its citizens. Moreover, *Medellin v. Texas* raised several issues, notably whether there were individual rights, and who gets to decide whether the Vienna Convention was binding. While the opinion raised traditional state-centered sovereignty concerns of a world court dictating how the US should interpret matters, the Court nevertheless noted in footnote 4, that "Article 36 grants foreign nationals 'an individually enforceable right to request that their consular offices be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.'" Moreover, Justice Breyer's strong dissent indicates that here were times in early US history where treaties raised enforceable rights regardless of the dichotomy of self and non self executing treaties. Breyer's dissent goes to the question of what the framers thought what a treaty meant.

Interestingly, it was the framers who enacted the Alien Tort Claims Act (ATCA) only a few years after the revolutionary war to protect maritime commerce. Although civil, the ATCA allow a foreign citizen, who is prevented from suing in his or her nation, to bring the claim in US Courts against those who violate the law of nations. In *Filartiga vs. Pena-Irala*, the plaintiffs sued a Paraguayan police inspector for torturing 17-year old Joelito Filartiga in a US Court, as they were prevented from suing in Paraguay. The plaintiffs in *Filartiga* argued that just like the crimes against maritime commerce, torture violated the "law of nations." The court agreed, reasoning that international law must not be understood in terms 1789 thinking, "but as it has evolved and existed among the nations of the world today..." Thus, in following the rationale set forth in *Paquette Habana*, the Court in *Filartiga* explained that where there is no treaty or executive act, resort must be placed on the custom and usages of civilized nations, and torture violates those accepted standards.

A few years after the court issued its opinion in *Filartiga*, the ATCA experienced a serious setback in terms of its scope and applicability in *Tel-Oren vs. Libyan Arab Republic.* In his concurrence, Judge Bork reasoned that conduct relative to foreign relations is entrusted to the executive and legislative branch – not the judicial branch, and that the president's diplomatic efforts in the Middle East would be significantly interfered with. Thus, *Tel-Oren vs. Libyan Arab Republic* serves as a counterweight to the normative development in the human-being-oriented approach by asserting the prerogatives of national interests in the context of foreign affairs and policy.

The current scope of the ATCA is defined in *Sosa vs. Alvarez-Machain*. The case involved arbitrary detention which the court did not accept as a violation of the law of nations. Nevertheless, this case does not signify as a death-knell for *Filartiga,* as it the Court retains the

idea of exploring ideas of existing international law and *jus cogens*. Indeed, the Court noted that the "door is still ajar [to further independent judicial recognition of actionable international norms] subject to vigilant doorkeeping, and thus [U.S. courts remain] open to narrow class of international norms today." The Court in *Alvarez-Machain* stated that there are still "good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action…"

The Court's language in *Alvarez-Machain* suggests that the ATCA will cover violations of international law that are analogous to the types of misconduct that were contemplated by the statute's drafters in 1789. The manner in which the Court interpreted the ATCA indicates that there are certain traveling torts that transcend the individual to the collective – genocide, torture and other serious violations of international law certainly do that.

The *Filartiga* case, and arguably *Alvarez-Machain* shifted emphasis away from a traditional approach, which viewed international law inapplicable to a government's treatment of its own citizens, to a new approach, which focused on the concept of *Opinio Juris* - what nations have expressed about a practice to which they consider themselves bound by. Going against the state-sovereignty approach, the ATCA serves an important function in extraterritoriality by providing redress for aggrieved foreign actors who have been left out or prevented from suing violators of international law in their own nations.