

Synthesis

1. Results of the reception process¹

1.1 Limits of comparability

1.1.1. Different constitutional starting points

In modern theory of international law, the thesis of a strong link between the reception of international law and the respective constitutional system of a certain community is not seriously disputed. The constitutional system of the United States, the Swiss Confederation and the European Community date from three different epochs: The U.S. Constitution of 1787 is one of the first examples of a typical constitutional order for the nation state era, whereas the Swiss Constitution of 1874 belongs wholly to this era. Finally, the very aim of the founding treaties of the European Community dating from the late 1950s was to overcome the nation state idea. The historical context in which the three constitutional systems arose marked each text considerably. One might thus explain the extraordinarily prominent position of international treaties and commerce at that time in the U.S. Constitution by the strong extroversion of the young American confederation. This again traces back to the former colonial status of the members of the union. In the Swiss Constitution of 1874, however, introversion – typical of constitutional concepts of the second half of the 19th century – is predominant. In the Swiss Constitution, a link to the international community is only made by defining treaty-making powers or competence for a declaration of war and peace. In both countries the uniform representation outwards was considered a basic criteria for a confederational statehood. The founding treaties of the European Community give a completely different impression: the status of the European Community as a subject of international law was not undisputed at that time,

¹ For footnotes see the German version of the synthesis.

and the competence of the Community for external power was only established in the field of international trade.

1.1.2 Special situation for the ECJ

1.1.2.1 Institutional aspects

A comparison of the institutional position of the ECJ, on the one hand, and the U.S. Supreme Court and Swiss Federal Court, on the other hand, reveals remarkable differences. First, the ECJ is not – like the U.S. Supreme Court or the Swiss Federal Court – the court of last resort in the European Community. Second, the ECJ must now and then fulfill a function that in the Swiss and U.S. political systems belongs to the legislature. Until the Single European Act came into force the European Parliament had, apart from budgetary authority, few effective measures at its disposal to control the Council or the Commission. To a certain extent, the ECJ assumed this task. Considering the vague guidelines in the founding treaties, control competence in the external field was from its very nature and beginning limited. It is not surprising that the ECJ based judicial restraint in this respect on the broad discretion of the Commission and the Council. The weak constitutional position of the European Parliament explains the fact that the rule of *lex posterior* (later-in-time-rule) had no basis for establishment in the European Community.

The ECJ – unlike the U.S. Supreme Court or the Swiss Federal Court – was (and is) not confronted with a single foreign policy. Even after the Treaty of Amsterdam, single protagonists of the member states guide European foreign policy.

1.1.2.2 Question of priority in the context of the European Community

The question of priority has two dimensions in the context of the European Community: it concerns the relationship between international law and Community law, on the one hand, and the relationship between international law as part of Community law and the law of the member states, on the other. With these two dimensions the question of priority in the context of the European Community is not substantially different from that in the Swiss or U.S. context. However, member states with a strong tradition of foreign policy have a considerably different position than the Swiss Cantons or the U.S. states. At first sight, one might be tempted to compare the integration process of the young

U.S. and Swiss confederations with that of the European Community. However, too many differences between the geopolitical and economic situations of the United States and Switzerland in the 19th century, and that of 20th-century Europe forbid such a comparison.

Conflicts between international and Community law or international law and the law of the member states must be resolved in the Community as in a confederal system. Unlike in the Swiss and European constitutional order, it is impossible to make a clear distinction between the two dimensions of the question of priority – European law vis-à-vis the law of the member states, and international law vis-à-vis European law. In the supranational context, the hierarchy of the different sources of law is less clear than in the confederal system. For the greater part of its jurisprudence, the ECJ first of all had to establish the predominance of Community law vis-à-vis member state law. For that reason, the ECJ abolished the strict dichotomy between internal (national or member states' law) and external law (Community or international law) by declaring Community law, which from the perspective of the member states is external law, as directly applicable law in the member states. A blurring of the limits between internal and external law also occurred in respect to the second dimension of the question of priority. For the reception of international law, the ECJ followed the same strategy used in the establishment of the predominance of Community law vis-à-vis member state law, by declaring international law as, in principle, directly applicable in the European law order.

1.1.2.3 Advisory opinion

Unlike the U.S. and Swiss judicial systems, the ECJ can preventively review the compatibility of planned international Community agreements with the founding treaty. With this competence for advisory opinion the ECJ has a completely different function in the field of external relations than that of the U.S. Supreme Court or the Swiss Federal Court. There are several reasons for this institutional difference. First, the different historical backgrounds of the three judicial systems play an important role. While a certain distrust of the judiciary is reflected in the position of the U.S. Supreme Court and the Swiss Federal Court, the competence of the ECJ to give advisory opinion marks a new element in the modern European judicial culture which arose after World War II, and conferred more competencies on the judicial branch of several European countries (e.g., Germany, Italy, Spain, France). Second, the different judicial position mirrors a distinct consciousness of

the relationship between international and national law. Whereas in the Swiss and U.S. constitutional orders this conflict could be resolved relatively easily with the rule of *lex posterior*, this solution was more problematic in the context of European law. On account of the affinity between the question of the priority of international law over national law and the predominance of European law over member states law, the acknowledgment of *lex posterior* in the European context was at best problematic. The solution was found in the flexible mechanism of advisory opinion. There are no strict material limits for treaty making in the European context. The competence for advisory opinion is solely a procedural solution to the problem of priority. Since the hurdles for amending treaties are much higher than for making an international agreement, it was guaranteed from the very beginning that the founding treaty would not be undermined by international treaty law. This progressive solution cannot disguise the fact that, so far, the advisory opinion as practiced by the ECJ has never resulted in an amendment to the Treaty. Possible conflicts between planned agreements and the founding treaties have been avoided without exception by modifying the agreement.

1.2 Comparative results

1.2.1 In general

1.2.1.1 Increasing international overlay of the legal order

The analysis of the reception process demonstrates that the U.S. Supreme Court, the ECJ, and the Swiss Federal Court were to an increasing extent confronted with violations of international law in the second half of the 20th century. The growing consolidation of international law, the internationalization of life styles and the increasing connection of transnational human rights positions have contributed to the importance of jurisdiction in international law. Finally, this process leads to an increasing interdependence of international and national law, or international and Community law.

With the increasing transfer of mediation and adjudication to the international level, the reception process adds a new dimension. Frequently the courts are confronted not only with the question of interpretation and application of international law, but also with decisions of the respective international bodies of mediation or adjudication. A great potential for the reception process lies in the proper compliance with and acceptance of these decisions.

1.2.1.2 Tendencies of constitutional development

Without answering the in some ways highly disputed questions of international and national or international and Community law in detail, one might formulate several principles as being tendencies of the three legal orders compared here. First, in none of the three legal orders does international law prevail unconditionally over internal law. Second, the constitutional guidelines to the reception of international law are highly flexible. Third, the courts have taken advantage of this flexibility in order to create strategies for the solution of conflicts and for techniques of non-decisions.

The hierarchical ranking of international law in the internal legal order is not exhaustively defined. Common to all three compared legal orders is the fact that international law has a position somewhere beyond constitutional law or the founding treaties. In the U.S. and Swiss legal orders, the rule of *lex posterior* belongs to a consolidated canon of case law. The rule of *lex posterior* is connected to the 19th-century idea of sovereignty and the traditional restraint that the courts exercise in questions of external relations. Against this background, it is not astonishing that the ECJ (at least so far) has not resorted to this solution. Generally, the principle of *lex posterior* is a clear rule and easy to handle. The necessity of mitigating the rigor of *lex posterior* is manifested in the Schubert-case law in Switzerland and in the clear-statement-rule in the United States. The requirement of a clear statement by the legislature of the intentional violation of international law grants the courts the necessary flexibility in the application of the rule.

The absence of *lex posterior* in the European legal order does not mean that the ECJ allowed the reception of international law without reservation. On the one hand, the ECJ succeeded in protecting the European legal order by denying the direct applicability of certain international law norms. On the other hand, the ECJ made plain in its advisory opinions that the autonomous structure for decision making inside the Community must be considered as a material limitation to the treaty-making power inherent in the European legal order.

1.2.1.3 Conception of international law

The differences in the reception process in the three legal orders compared might partly be explained by a particular conception of international law. Simply speaking, there are two extremes for the conception of international law. The first is based upon a political and diplomatic

understanding of international law that does not wholly deny its legal character, but in the last resort grants to the executive branch any decision about the relevance of international obligations. This concept implies the power to violate international law if politically opportune. When this conception of international law is predominant in the legal tradition of a certain country, the judiciary has only very limited competencies to control the compatibility of state acts with the international law obligations. In the case law of the U.S. Supreme Court this conception of international law prevails; the decisions of the ECJ concerning the reception of GATT/WTO agreements mirror this conception of international law as well.

The basis for the second conception of international law is a genuine legal and constitutional understanding of international law. Deriving from the rule of law, the application of and compliance with international law norms must be controlled in a judicial procedure. With this conception of international law, the courts play a more important role in the reception process, because they are able or even obliged to enforce international law obligations vis-à-vis the political branches. This conception is partially characteristic of the reception process of the ECJ and the Swiss Federal Court.

The concrete result of a reception process in the three compared legal orders can be placed somewhere between the two extremes of international law concepts. Where exactly the solution is placed depends on the concrete circumstances (consolidation of international law in a certain field, institutionalization of the mediation or adjudication on the international level, international prestige of the matter in question, position of the statehood in the community of states, etc.).

1.2.1.4 Break-through from the international level to the state or member state level

International law is blind towards the confederal structure of a statehood. That is, a federal state cannot deny its responsibility for the fulfillment of an international law obligation by relying on insufficient compliance with international law on the state level. On the international level the federal state bears the responsibility for the state's action.

In the three legal orders compared, the reception of international law served also to integrate the states or the member states. In the United States the integrative leverage played an important role during the consolidation phase of the young confederation. In the Community, the

case law concerning the association agreements merits emphasis; owing to the ECJ, the legal status of persons originating from countries associated with the Community was much improved in the member states. Another example of this phenomenon is the far-reaching change in the procedural legal orders of the Swiss Cantons caused by the reception of the ECHR.

However, the integrative potential of international law has its limits. The opposition of the states in the U.S. to the reception of international human rights, or the resistance of the member states in the Community to the reception of the GATT/WTO agreements demonstrates the fact that the internal structure of a statehood can play an important role in the reception process.

In general, the reception process as a whole had an advantage in the integrative effect of international law vis-à-vis the states or the member states. The acceptance of the predominance of international law over the law of the states or the member states does not *eo ipso* imply the predominance of international law in general. However, the reception of international law, which at first caused changes primarily at the state or the member state level, contributed to the consolidation of international law which later led to repercussions on the federal or Community level. The reception process on the state or the member state level may smooth the way for the reception on the federal or the Community level.

1.2.1.5 Large potential for conflict in the law concerning foreigners

The analysis of the reception process demonstrates clearly that the strained relationship between international and national law or Community law carries great weight in the legal fields concerning the legal position of foreigners (immigration, residence, work permits, family reunion). In this area, treaty law obligations and *ius cogens* play a prominent role. Jurisdiction in the law concerning the legal status of a foreigner is not characterized by a tenor friendly to international law. This may be explained by the highly political character of these questions.

1.2.2 For the reception of international trade agreements

In no other area is the interdependence of national interests and international legal order as strong as in the field of international trade agreements. In the three legal orders compared, important steps for the

interaction between international and national law can be traced back to economic developments (e.g., the extraordinary treaty-making power for trade agreements, the wide margin of discretion of the political branches in arranging international trade policy). Trade agreement law quietly assumed an autonomous position in the constitutional framework of external policies taking advantage of the generally introverted constitutional legal order.

Analyzing the reception of international trade law, it is impossible to measure every development by the same yardstick. In the three legal orders compared, there are international law-friendly and protectionist tendencies as well. Receptivity to international law is predominant in the early case law of the U.S. Supreme Court concerning treaties of friendship, commerce and navigation, in the case law of the ECJ concerning the free trade agreement and in the early decisions of the Swiss Federal Supreme Court concerning the Agreement about the founding of the European Free Trade Association. Protectionist tendencies are expressed in the case law of the ECJ and the U.S. Supreme Court concerning GATT/WTO law and case law of the Swiss Federal Court concerning free trade agreements. These decisions of the Swiss Federal Supreme Court are inconsistent with case law generally favoring direct applicability of international law norms. For its part, the case law of the ECJ contradicts the benevolent reception of free trade agreements. In Switzerland, a new tendency seems to emerge: Whereas in the mid-80's the Swiss Federal Court denied the direct applicability of the GATT without further explanations, in the 90's the Federal Government demonstrated its willingness to allow the direct applicability of single norms of the GATT/WTO agreements; the most recent case law points in the same direction.

The exceptional character of international trade law is reflected in the field of judicial enforceability and acceptance of decisions in civil law matters. The extraordinary density of international standardization and the well-established cooperation of different judicial bodies across national borders facilitated the reception process of these international agreements. In the future, the principles developed in this context may be followed as precedence in other areas.

With the increasing transfer of adjudication in international trade matters to the regional and international level, the significance of these decisions in the judicial procedure of the United States, the European Community or in Switzerland is put into question. The authority of the judicial bodies is dependent on institutional agreement which is the basis of the international regime. Most important is dispute settlement of

the WTO/GATT agreements. The status of the decisions of the dispute settlement bodies is largely unclear. With the possibility of appeal and sanctions available, the dispute settlement procedure of the WTO/GATT agreement has a consolidated judiciary character. For that reason, the national and community organs should be bound by the decisions of the dispute settlement bodies. In general, these decisions are binding only for the parties involved in the actual dispute. With the increasing consolidation of the law by the appellate body, it is possible that an infringement of this law can be generally invoked before national judges. However, confronted with a decision unfavorable to national or Community law, the courts are in a delicate position. Here different constellations must be discerned. It should be undisputed that the decision by the dispute settlement body cannot quash national or Community law. The abrogation or the modification of the law is the task of the competent national or Community organs. It is in dispute whether national courts are allowed to ignore a national norm that is contrary to WTO/GATT law in a concrete procedure referring to a decision of the dispute settlement body. In any case, the courts have to respect the political decision not to comply with the decision and to pay temporary compensation. However, the situation is most precarious for the courts when the political organs deliberately do not comply with the dispute settlement decision. In these situations of conflict, the question of how strong the position of the judiciary is vis-à-vis the political organs depends on constitutional law and tradition; generally, the judges will consider themselves bound to the political decisions.

The liberalization and internationalization of the markets increased the pressure on the national constitutional systems in the field of transnational protection of human rights. Therefore the question is whether international law, in particular consolidated international trade law, has a constitutional function for the transnational protection of human rights. GATT/WTO law has too many loopholes to fulfill this function completely. However, it is an important step in the consolidation process of international human rights turning into reality. In the Western European understanding of human rights, constitutional tradition favors the idea of transnational human rights in the economic area. Apart from the fundamental significance of the human rights for the rule of law in a national context, one has to bear in mind that economic liberalization was instrumental to peace keeping in the international sphere. For that reason, international trade law paved the way for the transnational protection of human rights.

1.2.3 For the reception of international human standards

Since World War II the importance of human rights protection has grown constantly. The protection of fundamental rights is based on a broad consensus in the international community of states. However, analysis of the reception process shows that overall goodwill may be changed into resistance in an actual case when international standards must be implemented.

Undoubtedly, the ECHR had the greatest influence on the Swiss national order. In Europe the ECHR triggered a coordination of human rights standards and today forms an «ordre public de l'Europe». The fact that the ECHR was not as successful in the European Community can be traced back to the resistance of the ECJ to a concurring jurisdiction from Strasbourg. The case law of the U.S. Supreme Court, which shows little receptiveness to international human rights standards, mirrors the political will of the United States not to be subordinate to a regional or international human rights protection system. Whereas the U.S. states are afraid of losing autonomy in defining the human rights standards which are sometimes considerably below the international level, in the European Community the improvement of human rights protection is owed above all to the member states.

The improvement of the legal status of persons coming from associated countries is to the credit of the ECJ. The ECJ took advantage of non-discrimination clauses in the association agreements and implemented these clauses autonomously in the Community legal order, against sometimes considerable resistance from the member states.

In the three legal orders compared, human rights protection – in the broadest meaning of the word – comes under the greatest pressure from international law standards. The result of the analysis is not completely conclusive only in the case of the ECJ. This may be explained by the limited competence of the ECJ in the field of asylum and immigration. The case law of the U.S. Supreme Court and the Swiss Federal Court clearly shows that international human rights standards are applied only reluctantly in the field of immigration.

1.2.4 For the reception of the extradition agreements

Analysis of the reception process in the field of extradition demonstrates how the reception process was subject to changes during the last two centuries. Originally, the understanding of extradition as an act of a sovereign state in compliance with a usually bilateral extradition agree-

ment was predominant. Questions during the extradition procedure mostly concerned the interpretation of the extradition treaty (legal force of the treaty, reciprocity, existence of an extraditable offense). That original understanding was modified in the 20th century by two developments: the improvement of human rights protection for the extraditable person, on the one hand, and the increasing codification of international assistance in criminal matters, on the other.

The reception of extradition treaties in the case law of the Supreme Court and the Swiss Federal Court shows that the reception process is considerably dependent on several factors on the international and the national level. The starting points for the U.S. Supreme Court and the Swiss Federal Court are principally the same: The old tradition of international cooperation in criminal matters led to a remarkable body of law consisting originally of mostly bilateral, and today increasingly of international, agreements. The political branches stress the will to cooperation. At first glance the reception of extradition agreements is well established in both the legal orders compared. A more detailed analysis of the reception process reveals important differences which can be traced back to two main causes: the position of the judiciary in the extradition process and the integration of the national legal order in an international regime. In the United States the weak position of the courts in the extradition procedure leads to strong judicial restraint, sometimes too considerate of the will of the executive. The lack of integration of the United States in the international community results in the fact that the necessary pressure for compliance with international minimal standards of human rights in extradition procedures does not exist. In this respect, the Swiss Federal Court did pioneering work by accepting the impetus from the ECHR and consequently modifying the practice of extradition. The protection of fundamental human rights standards has priority vis-à-vis the obligation of extradition in Switzerland. The case law of the U.S. Supreme Court does not comply with this standard. A priori international human rights aspects cannot have the necessary weight in an extradition process when the rule of non-inquiry is predominant.

With the turn of the new millennium the tendency of international extradition law to gain an additional dimension already emerges: the increasing internationalization of criminal law will put extradition procedure in the limelight, in particular in cases involving crimes against humanity.

1.2.5 Valuation of the reception analysis

In the three legal orders compared the most spectacular decisions concerning international and national law result from a conflict between international law on the one hand and national or Community law on the other. In these situations important political interests were involved which prevented the courts from respecting international law. Representative examples of that process in the context of Community law are decisions in which the ECJ denied the direct applicability of several norms of the WTO/GATT agreements. The Swiss Federal Supreme Court was in a comparable situation in the – until today rare – cases in which the Parliament more or less deliberately legislated against international law obligations. In the Swiss context, in these situations the judges bow to the pressure of the political branches as well. In the United States, the Supreme Court often has to decide conflicts between international law obligations and conflicting acts of the Executive branch, which are regularly decided in favor of the Executive.

Compared with the case law of the ECJ and the Swiss Federal Supreme Court, most recently the reception process has been poorly accomplished by the U.S. Supreme Court. Contributing to this negative result are cases such as *Alvarez-Machain*, *Breard* and *Sale*, characterized by an international law-unfriendly tenor.

Apart from these sensational cases, the case law of the ECJ and the Swiss Federal Supreme Court is generally marked by a greater receptiveness than that of the Supreme Court. The judges of the ECJ and the Swiss Federal Supreme Court are more sensitive to and more versed in international law matters. International standards, such as the acceptance of *ius cogens* or the rules of interpretation of treaty law in the Vienna Convention, are taken seriously. Whereas the case law of the ECJ and the Swiss Federal Supreme Court express the will that the Community and Switzerland should be a part of the global community of states, the case law of the U.S. Supreme Court is a manifestation of the isolation and parochialism of the United States.

At first glance, comparative analysis of the reception process confirms the cliché that international law is primarily favorable to small states, and therefore is better respected there. The considerable differences in the reception analysis in the various areas in the Swiss legal order lead to a more differentiated result: in small states, as well, the reception process depends on a variety of factors that may lead to a wide range of possible solutions in a specific case.

1.3 Consequences for the reception model

1.3.1 Starting-point

This analysis of the reception process was made on the basis of a systemic model in which international and national or Community law interact constantly. The conduct of the judiciary is part of a greater complex in the interaction between international and national law. The answer to the question why the U.S. Supreme Court, ECJ and Swiss Federal Court accept international law depends largely on why the United States, the Community and Switzerland generally accept international law. Understood systemically, the reception process constitutes the sum of factors evolving out of the concrete historical, political, economic and constitutional situation. Analysis of the reception process impressively demonstrates the wide range of possible solutions.

Analysis of the reception process serves a better understanding of the reception model. The courts form part of a bigger system that is subdivided into a national and an international subsystem. In the national subsystem the vertical and horizontal separation of power plays an eminent role. It is one of the most important tasks of the U.S. Supreme Court, the ECJ and the Swiss Federal Court to balance the powers between the different forces. When questions of the vertical and horizontal separation of powers are superimposed on questions of the external power, a clash is generally manifested. So far, developments in the national subsystem have generally been too little noticed. They are often decisive for the concrete result in a reception case.

1.3.2 National subsystem

1.3.2.1 Vertical division of powers

Questions concerning the vertical division of powers played an important role in the case law of the U.S. Supreme Court in the 18th and 19th century. In the 20th century, the controversy over the Bricker Amendment had a persistent influence on the reception process; the resistance from the states was an effective barrier to a better reception of international law by the Supreme Court. In the second half of the 20th century the Swiss Cantons seem to have resigned themselves largely to intermediation in the external realm by the federal power. This was an essential factor for the outstanding reception of the ECHR in Switzerland. The member states of the Community have the biggest comparative latitude for the shaping of foreign policy. The member states seek to keep

their sovereignty as far as possible in the development of external competencies for the Community.

1.3.2.2 Horizontal division of powers

The horizontal division of power, i.e., the balance of institutional equilibrium between the legislative and the executive branches, plays a growing role in the second half of the 20th century. The more the legislature challenged the prerogatives of the executive in the external realm, the more the reception process was superimposed with questions regarding the horizontal division of powers. In these situations there may be a risk that international agreements already in force are not implemented because the legislature does not take the necessary steps. Above all, this problem arises out of executive agreements that can come into force without any action by the legislature.

1.3.3 International subsystem

The second subsystem consists of the international level, where a multitude of different actors play important roles, in particular the executive branch and its diplomatic corps, international organizations, other states and their representatives, and last but not least, transnational judicial bodies. In this realm it is no easier to characterize the possible conflicts than it was for the national subsystem. Too many and too divergent interests are involved. As a tendency, one may notice that the international subsystem has less influence on the reception process than the national one, where the courts traditionally are more integrated.

1.3.4 Factor time

The systemic model of the reception process in the two subsystems is not static. The constellations in the two subsystems may change over time. It is not easy to integrate the time factor into a model of the reception process. However, this analysis of the reception process demonstrates clearly that the attitude of the courts towards international law may change over time. This is clearly shown in the case law of the U.S. Supreme Court. The tenor could not be more different between the late 18th and the early 19th century, on the one hand, and in the 20th century, on the other.

In the three legal orders compared the 1970s mark the beginning of the postmodern era. The oil crisis of 1973 for the first time made the western world aware of the economic dependence of individual states. Above all, the economic globalization needed international coordination. In that development international law gained density and institutionalization. The institution of international adjudication and dispute settlement contributed to a better compliance with international law. International law questions were put before the national judge more often. The range of possible actors grew considerably: Apart from the states as the primary subject of international law, individuals, international companies and non-governmental organizations played an increasingly important role.

2. Factors in the reception process

2.1 Preliminary remarks

An analysis of the reception process independent of the specific constitutional framework demonstrates that certain circumstances tend to foster, while others tend to hinder, the reception process. The effect of the factors described in the following is not absolute, i.e., it must always be considered within the system of an actual judicial body. While a certain factor may be decisive in one system, in another its effect may be mitigated by certain circumstances.

2.2 Accessibility of and familiarity with international law

International law plays a secondary role in the University curriculum of most states in Europe and the United States. International law skills are largely lacking in the training of judges. U.S. judges are less familiar with the procedural aspects of international dispute settlement bodies and courts and their decisions than the judges of the ECJ or the Swiss Federal Supreme Court.

The discussion of international law requires not only that judges possess skills in international law questions. Pleading by the parties is just as important. It is not a coincidence that the most prominent cases for the reception of international law in the context of the Community were initiated in the Netherlands – a country with a legal order traditionally friendly to international law.

In the three legal orders compared the publication of international law treaties is not optimally resolved. The search for specific treaties may be cumbersome because the name of a certain agreement is not clear or because a certain treaty is old. In the United States treaties are published with a delay of five to ten years. In Switzerland the systematic collection of treaties was only recently established, in electronic form as well as print. This collection is not complete; in particular secret treaties are not published. In 1999 the Control Committee of Parliament charged that the administration had lost oversight of existing treaty law and that it was not able to make a list of the agreements concluded during the last 60 years. In the European Community there is no special collection of treaty law. A search in the official journal may be time-consuming. For the judges it is absolutely necessary to have a systematic collection of treaties with a regular update of their scope. In the three legal orders compared, the problems of publication are resolved for the national and the Community law. One should make use of this experience and take advantage of this knowledge for the publication and better accessibility of international law.

2.3 International law tradition and the willingness to cooperate with international judicial bodies

Analysis of case law gives us an idea about how differently courts treat decisions of bodies of international law. Cooperation is never smooth. Even the relatively open-minded judges of the Swiss Federal Supreme court sometimes find it hard to accept jurisdiction from Strasbourg; it kept a distance from that of Luxembourg – at least in the past. For the ECJ competition between the judiciary organs in Strasbourg played an important role in fostering the negative attitude towards an accession of the Community to the ECHR. In the United States there is no continual discourse between the Supreme Court and international judiciary bodies.

The reserved attitude of the courts may not simply be traced back to a self-sufficient understanding of law by the judges. Only now a culture is evolving that governs the behavior of different dispute settlement bodies on the international level as well as the courts on the national level. The judges are confronted with a new phenomenon.

The interaction of the courts differs according to whether the discourse has been made with another national court or an international dispute settlement body. Questions arise about the meaning of varying inter-

pretations and reception results of different judicial bodies. Normally, the international agreement in which a state accepts the jurisdiction of an international body settles the relationship between the national courts and the international judiciary. If the agreement is not clear on this point, the compulsory character of international decision results from the principle of bona fide (good faith) for the parties having a wide margin of discretion in complying with the decision. It would be mistaken to put international and national judicial bodies in a generally hierarchical system. The reception process should not be limited to an uncritical adoption of decisions. Only when national and international courts maintain fair relations may this dialogue have synergetic effects. In general, national courts underestimate their capacity to contribute to the development of international law by their decisions.

The relationship among different judicial bodies is more difficult if there is no basic agreement. This is mainly the case when different member states of a certain treaty get into a dialog about treaty interpretation. On the one hand, these national decisions are a priori not binding for other national courts. On the other hand, too divergent an interpretation of the same international norm jeopardizes its respect and authority. A certain homogeneity in the interpretation of an international norm by different courts is therefore welcome. That leads to an obligation of national courts interpreting international law norms to take into consideration the interpretations of other judiciaries – an obligation that is also based on article 31(3) lit. b Vienna Convention. This obligation does not mean that the national court has to accept the interpretation of another country without reflection. Neither does it mean that every state practice has to be taken into consideration for a multilateral agreement, which in most cases would not be practically feasible. However, in view of the desired homogeneity in the international context, the courts must look into the practice of other states thoroughly and give reasons for a different interpretation. Such a discourse may promote the further development of international law.

2.4 Normativity of international law norms

Courts often struggle with greater difficulties in applying international law than national law. Practical problems result from the fact that the judges are not familiar with international law and its often dynamic interpretation. Language problems may lead to uncertainties in the interpretation of a treaty norm. Finally, the meaning of a certain treaty may be disputed among different states. Treaties having a primarily technical

character (e.g., double taxation agreements) are often undisputed and well accepted by the courts.

2.5 Open questions of legal consequences

The constitutional dilemma resulting from a contradiction between international and national or international and Community law is not only manifested in the questions of hierarchy but also in the question of legal consequences. Apart from the case of a violation of *ius cogens* resulting in the annulment of the conflicting national norm, the legal consequences in an actual conflict case are unclear. International law does not resolve that problem. Generally, international law cannot quash conflicting national law. It is the task of the competent national body to adjust the national legal order to the international law requirements. This general guideline is not easy to apply in a case in which the judge states a conflict between national and international law. The question of whether he is allowed to abrogate the national law is dependent on his constitutional competencies. For the solution of a concrete case, aspects of legal certainty, transitional problems and practicability must be taken into consideration. This is a big challenge for the courts.

2.6 Institutional security

The decisive step in the process of institutionalizing international law is the establishment of a dispute settlement body. This closes many of the remaining loopholes in the reception process on the national level. As soon as the national courts accept jurisdiction on the international level, it will contribute considerably to the consolidation of international law. In such a constellation, a national court may not dare to ignore the international jurisdiction. The institutional security of the ECHR was favorable to the reception of the ECHR in the Community and in particular in Switzerland. However, the Supreme Court seemed to be largely resistant to the jurisdiction of the organs of inter-American human rights protection. Because of the enlarged dispute settlement possibilities of the WTO, these agreements will most likely be well accepted by the contracting parties in the future.

3. Final considerations about the relationship of international and national law

3.1 Theoretical limitations

The focus of this study is an analysis of the reception process, not the theoretical question of how the relationship of international and national law or international and Community law should be defined. All the same, this study cannot reach an end without elaborating on that subject in a general way.

A constitutional framework that is friendly to international law must integrate the duty of accepting international law obligations into all organs. Organs having the treaty-making power must prevent conflicts with international law. The legislature bears an enormous responsibility in transposing international law obligations into the national legal order and has the power not to pass legislative acts contrary to international law. Finally, in defining an international law-friendly practice, the executive has a bearing on the international reputation of a state. These general possibilities for the shaping of an overall constitutional order friendly to international law are not discussed in the following. The focus is exclusively on the relationship of international and national law from the point of view of the courts, which must decide conflicts between diverging national and international law in actual cases.

At this point, the comparative analysis has reached its limits because the constitutional starting points in the United States, the European Community and Switzerland are too divergent. Therefore the following considerations are made solely on a general and theoretical level.

3.2 Complex matrix of conflicts

Not considering the details in the three legal orders compared, there is no doubt that today the hierarchical ranking between international and national law appears as a complex question. Different national norms with varying hierarchical ranking, diverse forms of international law norms and the factor of time must be taken into consideration. A simplified and schematic description shows the following matrix:

	ius cogens	custom	(ordinary) treaty	Executive agreement
older constitutional norm	priority of international law accepted	priority of international law disputed	priority of international law disputed	priority of international law disputed
more recent constitutional norm	priority of international law accepted	priority of international law disputed	priority of international law disputed	priority of international law disputed
more recent constitutional norm with the clear intention to violate international law	priority of international law in general accepted	priority of international law in general denied	priority of international law in general denied	priority of international law in general denied
older federal law	priority of international law accepted	priority of international law in general accepted	priority of international law in general accepted	priority of international law in general accepted
more recent federal law	priority of international law accepted	priority of international law disputed	priority of international law disputed	priority of international law disputed
more recent federal law with the clear intention to violate international law	priority of international law in general accepted	priority of international law denied	priority of international law denied	priority of international law denied
State law	priority of international law accepted	priority of international law accepted	priority of international law accepted	priority of international law accepted

Considering the variety of situations of conflict between international and national law, the question of whether the relationship can be put in a simple rule of conflict is legitimate. Every rigid and schematic solution can a priori only cover the relationship in a limited way. Today the interdependence and the diffusion of international and national law must be differentiated. One has to take into account the complexity by combining any conflict rule with means of mitigation, flexibility and differentiation. This is not only suggested for theoretical reasons, but also with regard to the capability of a state to act in matters of foreign affairs.

3.3 Hierarchical pre-understanding of the ranking question

The understanding of the relationship between international and national law is determined by a hierarchical pre-understanding. The picture of the hierarchy of norms and the pretension of an uncontradictable legal order characteristic of jurisprudence in Northern America and Europe had a strong influence on the considerations about the hierarchy of international and national law. In the federal states, it was eventually an easy step from the preemption of federal law over state law to the higher priority of international law over national law.

On the international level the increasing adjudication and individualization of international law stimulated the topos of hierarchy. In particular, on a theoretical level the idea of a universal protection of human rights and the dispute settlement procedure in the WTO presuppose a hierarchical ranking between international and national law. This suggests an understanding of the hierarchically higher and more legitimate normative quality of international law. However, there are no jurisprudential reasons for this suggestion.

The hierarchical pre-understanding misses the fact that international law has a different normative quality than national law. Whereas in the federal context the formation of law is comparable, i.e., on the state and federal level there is a certain democratic legitimacy of the law, this comparison fails on the international level. Often international agreements are the result of diplomatic, sometimes even secret negotiations. In a higher degree than national law, international agreements are the expression of a political compromise, and codify the lowest common denominator on the international level. The capacity to resolve a problem on the national level may be different from that on the international

level. Finally, international law lacks the essential integrative aim that allowed the U.S. Supreme Court and Swiss Federal Court to develop a rigorous case law in the federal context concerning the preemption of federal over state law.

A solely hierarchical understanding of the relationship between international and national law overlooks the fact that both bodies of law are increasingly coalesced. Thus, not directly applicable norms have to be made concrete by the national legislature. The contracting parties of any agreement are responsible for the implementation of, and the compliance with any international obligation. In particular, active practice by the national courts in interpreting international norms is necessary for the further development of international law. Finally, the application of international law is largely in the hands of national judges.

The impact of the question of hierarchy is mitigated by two tendencies in practice. The three courts compared developed strategies in order to coordinate international and national law. Thus, interpretation friendly to international law is a popular instrument in order to comply with international law obligations without giving international law a status hierarchically higher than national law. Lastly, it is essential to understand that the abstract predominance of international law over national law in the hierarchy of norms only favors the reception process when a court is competent to review the compatibility of national law with international obligations; otherwise the predominance of international law remains a dead letter.

In view of the deficiencies of the hierarchical pre-understanding, the question of whether the topos of hierarchy should be abandoned is legitimate. Apart from the conflict between *ius cogens* and national law, resulting in any case in the nullity of national law, against this background the relationship between international and national law should be based on the idea of essentially equal norms which must be applied in conflict with the aim of creating as few contradictions in the legal order as possible and in complying as well as possible with any international law obligation.

3.4 Sketch of international law-friendly constitutional order

3.4.1 Confession to the international rule of law

In the constitutional concepts of the United States, the European Community and Switzerland, the idea of the greatest possible flexibility in the external realm is predominant. This generally abets a solidariza-

tion of the judiciary with the political organs. The normativity of international law and the insight that strengthening the international rule of law vis-à-vis the international rule of power is in the interest of all should be considered intensively on a constitutional level. An international rule of law can only be established when national law resembling international law gets out of the arbitrary reach of the political organs. Lacking an established international jurisdiction, the national courts are responsible for complying with international law in a decentralized way. This premise implies the danger of a nationalization of international law. The nationalization of international law is in any case a lesser evil than non-obedience. It would render a good service to international law and to the international rule of law if the courts gained the competence to examine the position of political organs in regard to international law.

3.4.2 For the so-called hard cases

Even if the hierarchical pre-understanding is abandoned, two categories still form challenging cases for the courts: first, the constitution and founding treaties, as the hierarchically highest-ranking norms, demand predominance over any law, including international law. Second, when a legislature deliberately infringes upon international law obligations, it is impossible for the courts to ignore this intention. Without a clear constitutional directive, in these two difficult categories of cases the courts will regularly deny compliance with international law in the internal sphere.

It is to be assumed that in the future even constitutional orders very friendly to international law will continue to adhere to the predominance of constitutional law over international law. Therefore an open clash leads to an insurmountable contradiction between constitutionality and the international rule of law: in the internal realm the constitutional order prevails, in the external the international law obligation remains valid and leads to the international responsibility of the state. The possibilities for a solution to this conflict are very limited: the amendment of a treaty requires the consent of all other parties; the amendment of the constitutional order or the founding treaties is subject to severe conditions and is therefore often solely a theoretical solution.

In view of the fact that this contradiction is not resolvable, preventive solutions must be found. A possible strategy is the procedural solution

of a preventive advisory opinion. The judges' expertise and the preventive function favor this solution. However, advisory competence gives the judiciary a major role in answering questions of foreign policy. It goes without saying that this solution fails to resolve conflicts which arise only after the ratification of an international agreement. Because of the dynamic interpretation of several international law norms – in particular for the protection of human rights – this conflict situation emerges often.

Ex post strategies for resolving conflicting constitutional and international law are rare. One must reject the constitutional law-friendly interpretation of international law, which finally leads to a new meaning of the international law obligation. International law norms have an identical meaning for all states, which has to be defined with the rules codified in articles 31 to 33 Vienna Convention. An international law-friendly interpretation of the constitution or the founding treaties is useful. The Swiss Federal Supreme Court practiced an interpretation friendly to international law in its reception of the ECHR. Although the Swiss Federal Supreme Court covered up this argument stating that the ECHR guaranteed no further rights than the Swiss Constitution, it did take the ECHR and the practice of the Strasbourg organs into consideration by interpreting the constitutional guarantees. When human rights protection standards are lower on the international than on the national level, the international law-friendly interpretation runs a risk that the national standard will drop. If the international standard is considered only as a minimal standard, nothing argues against a higher national standard. Otherwise a solution might be seen in the practice, called *solange* by the German Constitutional Court, concerning human rights protection in Germany vis-à-vis Community law. The observance of international law obligations presupposes the guaranties of human rights on the national level in the sense of a qualified protection standard.

Like an *ultima ratio*, a court can declare the unconstitutionality of an international treaty. In view of the fact that this treaty remains valid on the international level, the courts do well to pronounce this verdict only if the damage in the external field is conceivable and limited.

The qualified *lex posterior* rule is an easy-to-handle rule for the judge in a conflict case. The courts are bound by these decisions only when the will of the legislature to infringe on an international law obligation is clearly expressed in an earlier legislative act. On the other hand, this means that in all other conflict situations, i.e., in cases with older legislative acts and more recent acts in which no infringement of interna-

tional law obligation is manifested, the coordination of international and national law must result in an as-good-as-possible observance of international law.

If a court has to resort to the *lex posterior* rule, the possibility should exist for the judges to declare the national law as incompatible to international law, combined with the mandatory application of the national law. The international rule of law demands this declaration. Even if, at the end, the national law is applicable, the judges can pay a minimal tribute to the international rule of law with this declaration.

In view of the open question of legal consequences in cases where the international law obligation prevails over national law, the courts would benefit from the possibility of declaring the incompatibility of national law with international law obligations without having to quash national law. In an actual case the courts would realize the observance of international law and at the same time give the mandate to amend national law in an international law-friendly manner to the legislative organ. These procedural possibilities would enhance the chances that the judges do not resort to a non-decision strategy to avoid answering the question of legal consequences.

3.4.3 Strategies of harmonization, flexibilization or differentiation

In view of the complexity of the conflict matrix for the relationship between international and national law, the idea of differentiation of the conflict rule suggests itself. There are different ways to achieve differentiation. First, one can adhere to the metaphor of hierarchy, but modify it by defining a special hierarchical order within international law and national law and the concrete ranking between these particular norms. The different ratification procedures in national law orders must not be the starting point for a differentiation of international law. Undisputedly, *ius cogens* and *erga omnes* obligations get a hierarchically higher ranking than international treaty law. However, it is a very disputed question whether a hierarchical order exists at all within international treaty law. The main problem in the hierarchization of international law is the fact that there is no consensus about the criteria that should be decisive for hierarchical rank. However, in a specific case rather than on a purely theoretical level, the judges should be able to master the hierarchization. A fundamental norm of international law, such as the prohibition of torture, must prevail over an obligation to extradite a person based on a bilateral agreement. The purely abstract

hierarchization holds the danger of a creeping degradation of international law norms.

Another possibility for hierarchizing international law is a special reference to certain international law obligations or treaties in the constitution. With such a reference the special meaning of these international law norms would be emphasized.

Finally, abandoning the hierarchy topos completely, differentiation can also be achieved by understanding the relationship of international and national law as based primarily on a concept of conflict of laws. This understanding would better respect the coalescing of the two bodies of law and leave more room for a value-oriented approach in resolving conflicts.

There is no need to embody in the constitution judicial non-decision strategies such as the reference to the opinion of the political branches in interpreting international treaties, the question of political doctrine or the act of state doctrine. First, all these strategies have been developed in case law without a constitutional basis. Second, the conditions for the application of a non-decision strategy, as well as the strategy as such, are disputed. Third, strengthening of the international rule of law in the constitutional schema in general would no longer allow the judges to carelessly resort to a non-decision strategy. Finally, if all the same a conflict situation of such a considerable political character should result that taking a decision would be asking too much of the courts, there is the possibility of non-decision in every constitutional system, even if not explicitly mentioned.

3.5 Result and outlook

States embedded in the Western European tradition of constitutionalism and aware of their responsibility not only towards the interior but also the exterior, have an approach generally friendly to international law. «It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.» (Louis Henkin) This overly positive appraisal, as absolute as it stands, contains a core aspect that has been neglected in this study. By and large the courts apply international law well in their daily work. The relatively rare infringements of international law obligations attract attention and sometimes produce a dramatic effect.

This analysis shows that judges take advantage of the flexibility in the constitutional framework defining the relationship between national and international law in various ways. They take into account the often difficult political and economical circumstances; however, international law obligations do not always receive the necessary weight in considering the different interests. One must not simply use the judges answering the difficult questions about the relationship between international and national law as constitutional scapegoats. For they can fulfill their task only under a double condition: if the constitution contain the necessary directives, and if the political authorities put into practice their intention to comply with international law obligations.

This study's analysis discloses the potential for the improvement of reception. The measures necessary have a primarily practical character: enhancement of the international law skills of lawyers in general and of judges in particular, better publication of international law sources and simpler availability of international law decisions, as well as an intensified dialogue between different judicial bodies on the international, supranational and national level. Implementing these measures, much would be done for the reception of international law.

Globalization confronting the U.S., the Swiss and the Community legal orders does not stop at the courts. In the future, it will be one of the most important tasks of the judiciary to take up momentum from the international level and to comprehend the national legal order, increasingly, in its international context.