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Lessons from LaGrand: An Argument for the Domestic Enforceability of Treaty-Based Rights Under International Prisoner Transfer Treaties

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**LESSONS FROM *LAGRAND*:
AN ARGUMENT FOR THE DOMESTIC
ENFORCEABILITY OF TREATY-BASED RIGHTS UNDER
INTERNATIONAL PRISONER TRANSFER TREATIES***

*Louis Antonacci*¹

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* The views expressed in this article are those of the author and do not reflect those of the U.S. Army Corps of Engineers.

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I. INTRODUCTION

Many people do not know this, but the global community has created an international prisoner transfer regime that allows individuals who are incarcerated in foreign countries to transfer back to their home country to serve out the remainder of their sentences. The driving principle is that prisoners are more likely to be rehabilitated in their home country because of their familiarity with the language and culture and proximity to family and friends. The regime is incorporated in many multilateral and bilateral treaties to which the United States is a party. The treaties never require that the country holding the prisoner transfer him or her back to their home country. Indeed, only candidates who demonstrate low levels of culpability for their crimes are considered good candidates for transfer. Additionally, prisoners who leave victims in their country of incarceration are considered especially poor candidates.

However, the treaties do require the country holding the prisoner to notify that prisoner of his or her right to apply for transfer. In the federal prison system of the U.S, this is not a problem; almost all foreign nationals who are party to a prisoner transfer treaty with the U.S. are notified of their right to do so in a timely manner. However, in state prisons there is no such guarantee because the federal government of the U.S. does not require state compliance with these treaties. The argument essentially is that these prisoner transfer treaties are non-self executing and therefore cannot impose any obligations on the states within the U.S. without Congress implementing legislation requiring such compliance. The Congress has not done so. Wrapped up in this argument is the notion that the structure of our federated system precludes the federal government from encroaching on an area of governance so clearly within the sphere of state sovereignty as prisons. This is bad law and bad foreign policy.

This article will demonstrate that foreign nationals incarcerated in U.S. State prisons, who are nationals of countries that are parties to the Convention on the Transfer of Sentenced Persons² (hereinafter COE Convention), are able to assert their right to timely notification of their right to transfer. These rights come via the *Ex parte Young* doctrine³. This article will analyze the judgments of the International Court of Justice (hereinafter ICJ) in *Germany v. United States* (hereinafter *LaGrand Case or LaGrand*)⁴ and *Mexico v. United States* (hereinafter *Avena*)⁵ to show that the Court's analysis of the Vienna Convention on Consular Relations⁶ (hereinafter VCCR) to confer individual rights on foreign nationals should be followed to hold that international prisoner transfer treaties also confer rights on individuals. That is, if U.S. state courts interpreted the COE Convention in the same manner as the ICJ interpreted the VCCR, then U.S. state courts would find that the COE Convention is self-executing and therefore endow certain foreign nationals with justiciable rights of which the courts could enjoin enforcement.

This paper asserts that the ICJ's method of treaty interpretation is more appropriate than the ambiguous and inconsistent methods by which U.S. courts analyze the legal force of treaties in light of both international legal norms and the U.S. Constitution itself. This argument has three main

² Convention on the Transfer of Sentenced Persons, 25 U.S.T. 2867 (March 21, 1983), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/112.htm> [hereinafter COE Convention].

³ See *Ex parte Young*, 209 U.S. 123 (1908).

⁴ *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

⁵ *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (March 31), available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

⁶ See Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, 596 U.N.T.S. 262-512, T.I.A.S. No. 6820, available at <http://www.un.org/law/ilc/texts/consul.htm> [hereinafter VCCR].

components: 1) Federal courts should not distinguish between self-executing and non self-executing treaties in determining the domestic enforceability of U.S. treaty obligations because such a distinction was not contemplated by the drafters of the U.S. Constitution; 2) Courts should interpret treaties from a contractual perspective and therefore the U.S. should not unilaterally determine whether it is bound by its own treaty obligations after the fact and 3) The increasing importance of international law in the modern world demands that the U.S. pay greater deference to the role of international law in our national legal system.

Next, this paper will establish that the individual states of the U.S. have a history of non-compliance with international prisoner transfer treaties. The repeated failure of the states to notify foreign nationals of their rights under the applicable prisoner transfer treaties is similar to that of Arizona's failure to notify the LaGrand brothers of their rights under the VCCR. Because the rights of prisoners under our foreign treaties should not depend on whether they are in state or federal prison, foreign nationals in state custody who are not informed of their right to transfer should be able to enjoin state officials to assert that right and ensure future compliance. This argument stems from the fundamental premise, demonstrated in Part IV, that obligatory rights created under treaties are on par with federal law and thus should be enforceable by foreign nationals in U.S. federal courts. This demonstration of U.S. compliance with its treaty obligations will not only galvanize adherence to constitutional authority in domestic courts, but will, more importantly, diminish the growing resentment of the U.S. abroad due to the U.S.' history of treaty violations and the international community's belief that the Bush Administration's unilaterally invaded Iraq.

II. *LAGRAND AND AVENA*

On June 27, 2001, the International Court of Justice held in *LaGrand* that the VCCR confers on foreign nationals who are arrested and detained in the U.S. an individual right to be notified of their right to communicate with their local consulate regarding their criminal proceedings.⁷ The ICJ found that the U.S. had breached its obligation under the VCCR to inform the LaGrand brothers of their right to consular access. The Court reaffirmed this decision in March 2004 in *Avena*, holding that the U.S. had violated the right of 51 Mexican nationals to be notified of their right to consular access. The facts of *LaGrand* are extreme, and its unfortunate conclusion was the execution of Walter and Karl LaGrand despite a provisional order by the ICJ to stay their executions until further proceedings could determine the merits of Germany's claim against the U.S. It should be noted that this article does not purport to comment on the fate of the LaGrand brothers. The "unfortunate conclusion" referred to is the failure of the U.S. government, in this case, to uphold a provisional order of the ICJ.

A) FACTS OF *LAGRAND*

Walter and Karl LaGrand were born in Germany in 1962 and 1963, respectively.⁸ These two German nationals moved, with their mother, to the United States in 1963, and for the majority of their lives they had permanent residence in the United States. The LeGrands even became the adoptive children of a U.S. national.⁹ The LaGrand brothers were arrested on January 7, 1982, as suspects in a bank robbery in Marana, Arizona. During the commission of the robbery, a bank manager was murdered and

⁷ *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 104.

⁸ *Id.* ¶ 13.

⁹ *Id.*

another bank employee was seriously injured.¹⁰ The LaGrand brothers were subsequently tried in the Superior Court of Pima County, Arizona, where they were both convicted of murder in the first degree, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping.¹¹ Both were sentenced to death on December 14, 1984.¹²

The U.S. and Germany were parties to the multilateral Vienna Convention on Consular Relations and the Optional Protocol at all times relevant to these proceedings.¹³ The Optional Protocol to that Convention Article 36, paragraph 1(b) provides:

"[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this subparagraph.*"¹⁴

The United States conceded that it had violated its obligations under this provision because the LaGrands were not notified of their right to communicate with their consulate.¹⁵ After two unsuccessful appeals with state-appointed counsel, the LaGrand brothers notified their consular post in June 1992.¹⁶ The LaGrand brothers did not learn of their rights under the Vienna convention from the Arizona authorities, but from some other

¹⁰ *Id.* ¶ 14.

¹¹ *Id.*

¹² *Id.*

¹³ *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104, ¶ 15.

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.*

¹⁶ *Id.* ¶ 18 – 22.

source.¹⁷ It was not until December 21, 1998, that the LaGrands were formally notified of their right to consular access by U.S. authorities.¹⁸

The LaGrands appealed to the 9th Circuit Court of Appeals to set aside their death sentences on the grounds that the U.S. had failed to comply with Article 36 1(b) of the VCCR.¹⁹ The court rejected this claim on the grounds of the procedural default rule. The LaGrands had failed to raised the issue in state court and could not show cause or prejudice that precluded them from doing so on appeal.²⁰ Karl LaGrand was executed on February 24, 1999.²¹

On March 2, 1999, Germany instituted proceedings against the United States in the ICJ requesting a provisional measure that would enjoin the United States and to “take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings...”²² The ICJ granted Germany’s request and issued a provisional order to that effect the following day.²³ Despite the provisional order, Walter LaGrand was executed later that same day.²⁴

Germany brought several claims against the United States in the ICJ as a result of the United States’ violation of the Convention and its failure to comply with the provisional order. The Court found that the VCCR had created an obligation on the U.S. to inform the LaGrand brothers of their right to consular access; and that the U.S. had breached

¹⁷ *Id.* ¶ 22.

¹⁸ *Id.* ¶ 24.

¹⁹ *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104, ¶ 27-29.

²⁰ *Id.*

²¹ *See LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104, ¶ 29.

²² *Id.* ¶ 30.

²³ *Id.* ¶ 34.

²⁴ *Id.*

that obligation by its failure to inform them of their rights within a reasonable time. Subsequently, Mexico brought a claim against the U.S. alleging that the U.S. had similarly violated the rights of 52 of its nationals by failing to inform them of their rights under the VCCR.²⁵ Again, the ICJ found that U.S. had violated the rights of the Mexican nationals by not informing them of their right to consular access pursuant to the VCCR.²⁶ This article will focus on the court's interpretation of the VCCR so as to confer individual rights on foreign nationals.

B) THE ICJ INTERPRETATION OF THE VCCR IN *LAGRAND* AND *AVENA*

The ICJ specifically interpreted Article 36, paragraph 1 of the VCCR to create individual rights for foreign nationals of Member States who are arrested in other Member states.²⁷ The court noted that the purpose of Article 36 is to determine the obligations that the State who is holding the foreign national has towards that prisoner due to nationality.²⁸ The court emphasized the final sentence of paragraph 1 (b): “The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”²⁹ The ICJ also emphasized that Article 1 (c) precludes the sending State from providing consular assistance to the prisoner “if he expressly opposes such action.”³⁰ The Court concluded that: “[t]he clarity of these provisions, viewed in their context, admits of

²⁵ See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (March 31).

²⁶ *Id.*

²⁷ *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104, ¶ 77; see also *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128, ¶ 40 (stating that “The Court would recall that, in the *LaGrand* case, it recognized that ‘Article 36, paragraph 1 [of the Vienna Convention] creates individual rights [for the national concerned]...’”).

²⁸ *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104, ¶ 77.

²⁹ *Id.*

³⁰ *Id.*

no doubt...[b]ased on the text of these provisions...Article 36, paragraph 1, creates individual rights...[t]hese rights were violated in the present case.”³¹

The Court based its conclusion that Article 36, paragraph 1, creates individual rights on its reasoning that the context of the Article was to define the *obligations* that the sending State has toward the detainee and the receiving State, and on the text of the provision.³² The text is explicit: it provides that the sending state “shall inform” the prisoner of “his rights.”³³ Logically, if the sending state is *obligated* to inform the prisoner of the substance of the provision, then it follows that the prisoner necessarily has a *right* to be so informed.³⁴

The ICJ interpreted the VCCR to confer an individual right on each foreign nationals even though the language of the preamble to the VCCR makes it clear that the privileges and immunities guaranteed by the Convention were not meant to benefit individuals.³⁵ The preamble clearly states:

The States Parties to the present Convention... Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, *Realizing that the purpose of such privileges and immunities is not to benefit individuals...*³⁶

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 77.

³⁵ *Id.*

³⁶ *Id.* (emphasis added).

It could be argued that the preamble precludes any possibility of this treaty creating an enforceable individual right. The ICJ, however, chose to interpret Article 36 as to confer individual rights on foreign nationals despite the anticipation and dismissal of that possibility in the preamble.

This disregard of hortatory language strikes at the very essence of the court's reasoning. The language of the preamble is not obligatory in nature. Rather, this disclaimer of individual rights is cast in vague, hortatory language: "[b]elieving, ...[r]ealizing..."³⁷ The ICJ clearly chose to give greater weight to the obligatory language of Article 36(1) because the specific and unambiguous force of that Article evidences and imposes particular obligations upon the parties who agree to be bound by it, as opposed to ideals to which they agree to aspire.

Further, the ICJ in *Avena* specifically noted the universal applicability of its reasoning:

To avoid any ambiguity, it should be made clear that, while the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in any respect of the Court's findings in the present Judgment.³⁸

While it is clear that the court is specifically referring to the VCCR in this passage, it is relevant to note that the ICJ explicitly addresses an issue of principle. It is precisely this principle that suggests the Council of Europe Convention on the International Transfer of Prisoners also creates individual rights by virtue of the obligations it creates on receiving States.

³⁷ *Id.*

III. THE COUNCIL OF EUROPE CONVENTION ALSO CREATES RIGHTS BY VIRTUE OF OBLIGATIONS

The ICJ's analysis of the VCCR demonstrates that international prisoner transfer treaties also confer individual rights on foreign national detainees by virtue of the text and context of their relevant provisions.³⁹ The U.S. is a party to several multilateral and bilateral international prisoner treaties, though a comprehensive analysis of each would be far too cumbersome for the purposes of this article. This article will only analyze the language of the Council of Europe Convention (COE Convention), a multilateral treaty that has been ratified by 52 countries.⁴⁰ The analysis will demonstrate that the text of COE Convention confers an individual right on foreign nationals of member states detained in the U.S. for the same reasons that the ICJ determined that the VCCR did: the text of the COE Convention clearly creates a binding obligation on member States to inform foreign nationals of their rights under the treaty, and to process their applications in a timely fashion.

The COE Convention and the VCCR both essentially impose an obligation on the states to give special consideration to foreign nationals who have become the object of their criminal justice systems. The primary objective of the COE Convention is to further the rehabilitation of the prisoner, while that of the VCCR is to "ensure the efficient performance of functions by consular posts on behalf of their respective States..."⁴¹

³⁸ *Avena*, *supra* note 5, ¶ 151.

³⁹ *See* COE Convention, *supra* note 2, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/112.htm>.

⁴⁰ *See id.*

⁴¹ *See* VCCR, *supra* note 6, at preamble.

Recall that the ICJ did not allow the vague language of the preamble to the VCCR to undermine the obligations cast in Article 36.⁴²

The COE Convention, unlike the VCCR, expressly states that the rehabilitation of sentenced persons is in fact one of the primary objectives of the treaty:

The member States of the Council of Europe and the other States, signatory hereto,
Considering that the aim of the Council of Europe is to achieve a greater unity between its members; Desirous of further developing international co-operation in the field of criminal law; Considering that such co-operation should further the ends of justice and the *social rehabilitation of sentenced persons*.⁴³

It is clear that this treaty has express humanitarian policy goals. Signatories to the agreement expressly agree to such goals, as opposed to signatories to the VCCR, expressly dismiss them.⁴⁴ It follows then that if the VCCR can impute individual rights on foreign nationals, even though its preamble expressly states that the privileges that arise out of the treaty are not meant to benefit individuals, then surely the COE Convention, which was drafted with the expressed purpose of benefiting individual human beings, should at the very least lend itself to such an interpretation. However, the ICJ limited its interpretation of the VCCR to the ordinary meaning of the words chosen by the parties, only giving legal effect to the explicit obligations rather than to vague language beyond judicially manageable standards.

Article 36 of the VCCR and Article 4 of the COE Convention both describe the obligations that the State holding the prisoner has to the

⁴² See discussion *infra* Part II.B.

⁴³ See COE Convention, *supra* note 2, at preamble (emphasis added).

⁴⁴ *Id.*

prisoner and to the prisoner's country of nationality.⁴⁵ Article 4 of the COE Convention is titled "*Obligation to furnish information.*"⁴⁶ Paragraph 1 states that: "[a]ny sentenced person to whom this Convention may apply *shall be informed* by the sentencing State of this Convention."⁴⁷ Paragraph 2 states in relevant part: "If the sentenced person has expressed an interest to the sentencing State in being transferred under this Convention, *that State shall so inform* the administering State..."⁴⁸ The "obligation to furnish information" described in this Article is similar to the obligation imposed in Article 36 of the VCCR, which defines the duties that the sentencing State has to the detainee and his country of nationality.⁴⁹ Therefore, the context that the court emphasized in defining the individual right created by Article 36 of the Vienna Convention is similar to that of Article 4 of the COE Convention and supports the argument that this Article also creates individual rights.⁵⁰

It is clear that the obligations imposed on the sentencing State in Article 4 of the COE Convention create individual rights for foreign national detainees in light of the *LaGrand* holding.⁵¹ Article 4, paragraph 1, orders that if the Convention applies to any detainee, then that detainee "*shall be informed*" by the State detaining him of his rights under that Convention.⁵² The use of the word "shall" is dispositive here: it clearly demonstrates a mandatory obligation on the receiving State by virtue of

⁴⁵ See VCCR, *supra* note 6, at art. 36. See also COE Convention, *supra* note 2, at art. 4.

⁴⁶ See COE Convention, *supra* note 2, at art. 4 (emphasis added).

⁴⁷ *Id.* (emphasis added).

⁴⁸ *Id.* (emphasis added). The "administering State" is that State of nationality of the prisoner.

⁴⁹ *Id.*; see also VCCR, *supra* note 6, at art. 36.

⁵⁰ See *LaGrand*, *supra* note 4, ¶ 77. See also COE Convention, *supra* note 2, at art. 4.

⁵¹ See *LaGrand*, *supra* note 4, ¶ 77. See also COE Convention, *supra* note 2, at art. 4.

⁵² See COE Convention, *supra* note 2, at art. 4 (emphasis added).

the detainee's status as a national of a foreign country who is a party to this Convention.⁵³ Paragraph 2 of that Article demands that "If the sentenced person has expressed an interest...in being transferred...that State *shall so inform* the administering State..."⁵⁴ The language here is just as clear, except here the obligation of the receiving State to inform the sending State is created as a result of the prisoner's expressed request in applying for a transfer pursuant to this Convention. The texts of these provisions mirror those of Article 36 of the VCCR.⁵⁵

These two Articles create obligations on the sending State by use of a word that has no ambiguity attached to it, "shall." The word "shall" unequivocally creates obligations. By the use of "shall", it demonstrates that when one applies the reasoning of the ICJ in *LaGrand*, Article 4 of the COE Convention creates individual rights for foreign detainees.⁵⁶ Both the context and the specific language of these two provisions are unambiguous and identical in the types of obligations they impose in regard to foreign detainees, and should, therefore, be similarly construed. If one adopts the method of treaty interpretation employed by the ICJ in *LaGrand*, which construes the plain meaning of obligations expressly agreed upon by the parties to create a right in the beneficiary of such obligations, then the COE Convention creates the same right for foreign nationals of Member States serving determinate prison sentences in the U.S.

⁵³ *Id.*

⁵⁴ *Id.* at art. 4, ¶ 2 (emphasis added).

⁵⁵ See VCCR, *supra* note 6, at art. 36.

⁵⁶ See COE Convention, *supra* note 2, at art. 4

IV. TREATY OBLIGATIONS CAN CREATE DOMESTICALLY ENFORCEABLE RIGHTS

The ICJ's method of analyzing the VCCR to create rights where it unambiguously creates obligations is the proper way to analyze an agreement between sovereign nations. The Constitution commands it by virtue of the Treaty Power⁵⁷ and the Supremacy Clause.⁵⁸ History provides ample support for a plain meaning interpretation of these provisions. Nonetheless, the U.S. courts have a confused and divergent history of determining the judicially enforceable rights and obligations created by treaties, limiting their enforceability by virtue of the federalist structure of our government and by applying distinctions such as "self-executing" and "non-self-executing" where they do not apply.

It is the position of this article that domestic courts should interpret the obligatory terms of a treaty for what it is: a contract between sovereign nations. If it is determined by the courts that the obligations created by the treaty are beyond the scope of the treaty power by virtue of its subject matter or other constitutional limitations, then such a treaty provision should be rendered unconstitutional for those reasons. A court should not, however, interpret the expressed obligations of treaties as judicially unenforceable because they are non-self-executing. This will serve to strengthen the role of international law in the U.S. and encourage other countries to follow suit, thereby creating a respect for international legal

⁵⁷ See U.S. CONST. art. II, § 2, cl. 2.

⁵⁸ See *Id.*, at art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

norms that the U.S. and the global community can rely upon as tangible and enforceable.

This article has established that the COE Convention creates a right for foreign nationals of member states who are incarcerated in the U.S. to be notified of their right to apply for transfer to their home country. Unfortunately, the individual U.S. states have a poor record of compliance with our international prisoner transfer treaties.⁵⁹ Ronald Reagan signed the COE Convention on March 21, 1983, and it was fully ratified and deposited by the U.S. on March 11, 1985.⁶⁰ On September 2, 1997, the U.S. government sent a declaration to the Secretariat General of the Council of Europe who deposited it on September 3, 1997.⁶¹ Relevant parts of the declaration read:

Under Article 3, paragraph 1(f), of the Convention on the Transfer of Sentenced Persons, both the sentencing and the administering States must agree to the transfer of a sentenced person. In the case of the United States of America, *where a sentenced person has been convicted by a state of the United States of crimes under the laws of that state and is in the custody of authorities of that state, the Government of the United States will not agree to a transfer unless the competent state authorities first give their consent.*

In any such case, the state government must have state legislation authorizing consent to such transfers and be prepared to exercise that authority in the specific case...

As just noted, however, even in those states that have such authority, specific consent of the appropriate state

⁵⁹ See David S. Finkelstein, "Ever been in a [Foreign] Prison?": *The Implementation of Transfer of Penal Sanctions Treaties by U.S. States*, 66 *FORDHAM L. REV.* 125, 153. (October 1997).

⁶⁰ See COE Convention, *supra* note 2.

⁶¹ See Council of Europe, List of Declarations Made with Respect to Treaty No. 112, at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=8&DF=30/01/05&CL=ENG&VL=1> (last visited Mar. 5, 2003).

authorities would be required for transfer of any particular individual who was convicted of violating that state's laws. Consent may not be presumed from the existence of statutory authority; *indeed, there are some states which authorize few, or no, transfers notwithstanding the statutory authority to consent.* While the Government of the United States strongly encourages state participation in transfers under the Convention, *the United States Government cannot compel a state to consent to the transfer of an individual who was convicted of violating that state's laws.*⁶²

The U.S. has clearly conceded that it cannot compel state governments to comply with the terms of the agreement that it has signed and ratified. It does not seem proper that a national government is powerless to enter into agreements with other sovereign nations that grant reciprocal rights to each other's nationals in their respective countries and simultaneously bind its constituent bodies. Such a stance diminishes the ability of other nations to rely on the U.S. as a contracting party and thereby provokes serious resentment towards the U.S, which in turn threatens the security of U.S. nationals abroad. The enforceability of treaties that confer rights on foreign nationals in the U.S. should not be limited by the federalist structure of our republic if the treaties are otherwise constitutional, because such a limitation was contemplated and dismissed by the drafters of the U.S. Constitution.

A) CONSTITUTIONAL SUPPORT AND LIMITATIONS

The Constitution of the U.S. plainly puts treaties made under the authority of the United States on par with federal legislation by virtue of the Supremacy Clause.⁶³ Mr. Justice Butler properly interpreted this

⁶² *See id., at*

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=8&DF=30/01/05&CL=ENG&VL=1> (emphasis added).

⁶³ *See* U.S. CONST., art. VI, cl. 2.

simple provision in *Asakura v. City of Seattle*: “[t]he treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend ‘so far as to authorize what the Constitution forbids,’ it does extend to all proper subjects of negotiation between our government and other nations.”⁶⁴ The historical records of the ratification of the constitution make it clear that the Framers intended precisely this interpretation of the Treaty Power and the Supremacy Clause.

The Articles of Confederation did not give the central government the ability to ensure state compliance with the treaty obligations of the national government, which was a principle reasons that the Framers decided to establish a new government under the Constitution rather than simply amend the Articles of Confederation.⁶⁵ As James McHenry noted at the Federal Convention of 1787, “if a State acts against a foreign power contrary to the law of nations or violates a treaty, [the Confederation] cannot punish that State, or compel its obedience to the treaty.”⁶⁶ John Jay also commented on the importance of centralizing the Treaty Power and imposing it on the individual states:

It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four individual confederacies.⁶⁷

⁶⁴ See *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). (internal quotation citing *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)).

⁶⁵ See Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1103. (1992).

⁶⁶ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24-25 (Max Farrand ed., rev. ed. 1966).

⁶⁷ See THE FEDERALIST NO. 3, at 14-15 (John Jay) (Jacob E. Cooke ed., 1961).

James Madison expressed similar sentiments, “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”⁶⁸ These comments by the drafters of the U.S. Constitution make it clear that they realized the importance of the ability of the federal government to speak with one voice. The States had been undermining the U.S.’s ability to effectively manage its foreign affairs and it was clear that we would be unable to promote international comity if other nations could not rely on it to make agreements that would bind its constituent bodies.⁶⁹

As Carlos Manuel Vazquez noted in his article, *Treaty-Based Rights and Remedies of Individuals*:

[t]he Framers corrected this problem with respect to treaties in exactly the same way they corrected it with respect to the statutes of the Union and the Constitution itself: they declared all three to be the supreme Law of the Land, and accordingly operative directly on individuals and enforceable in the courts.⁷⁰

Clearly the Framers intended that the U.S’ international treaties be on par with federal legislation and binding on state governments. Mr. Justice Sutherland articulated the proper reading of the treaty power in *U.S. v. Belmont*, “state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.”⁷¹

⁶⁸ See THE FEDERALIST NO. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961).

⁶⁹ See Vazquez, *supra* note 65, at 1103. Prof. Vasquez gives some examples of problems the U.S. was having while concluding a commercial treaty with Great Britain because of previous state noncompliance with other treaties.

⁷⁰ *Id.* at 1104 (internal quotations omitted).

⁷¹ 301 U.S. 324, 332 (1937).

The treaty power is inherently limited by the Constitution, and thus no treaty can be made that would be repugnant to its terms and spirit.⁷² For example, a treaty could not be made that would criminalize certain acts in the United States because federal criminal statutes can only be legislated with the consent of Congress. Thus such a treaty provision would be patently inconsistent with the terms of the Constitution. There is also an inherent subject matter limitation on the scope of the treaty power, and the power of the federal government to bind the states by its treaty obligations should not be expanded beyond the proper objects of foreign relations.⁷³ This distinction is not easily demarcated with a bright-line rule, but it is certainly within the capacity of federal courts to determine if a treaty addresses the proper subject matter when asked to rule on its enforceability. An example in which the federal government is acting beyond its proper scope of power to bind the states would be one that required certain curriculum in public education in the U.S. and other

⁷² See *Missouri v. Holland*, 252 U.S. 416 (1920); see also, Charles A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 413 (November, 1998). Bradley notes that the records of the Virginia Ratifying Convention make it clear that the Framers did intend there to be limits on the treaty power, but those limits were essentially that the delegation be the proper object of a treaty, i.e., the subject matter of treaties should be germane to foreign affairs. The author does not wish to distort the treaty power or the foreign commerce clause in the same way that the interstate commerce clause has been so manipulated, but surely a treaty regarding the rights of foreign nationals who are prisoners of U.S. federal or state correctional systems is the proper object of such an agreement.

⁷³ Robert Anderson makes a strong argument against this approach of a “subject matter” limitation on the treaty power. He argues that because two nations have decided to contract about an issue necessarily makes that issue one of international concern and therefore the proper subject matter of a treaty. This argument is based on the notion that the treaty power creates a right to contract for the federal government, and therefore whatever the federal government chooses to contract on is necessarily a matter of international concern if there is another sovereign nation who wishes to bargain on that issue. See Robert Anderson “*Ascertained in a Different Way*”: *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*. 69 GEO. WASH. L. REV. 189 (2001). The author agrees that one should take a “contract” approach to interpreting the terms of a treaty, see *infra* Part IV.B.1, but takes the position that there is a subject matter limitation on the treaty power that is beyond the Executive’s ability to find a contracting partner.

contracting states. Clearly such a treaty operates with domestic and international effect, and while one could argue that such a treaty may benefit foreign relations for a variety of reasons, the severity of its impact on domestic affairs is disproportionate to its germaneness to foreign affairs. Put another way, the relationship between the object of the treaty (domestic public school curriculum) and the proper subject matter of such an agreement (foreign affairs) is far too tenuous to be persuasive and therefore constitutional.

The Supreme Court similarly analyzed the interstate commerce clause⁷⁴ in *U.S. v Morrison* in the same manner and found that the relationship of the Violence Against Women Act (VAWA) with interstate commerce was deemed too attenuated to justify the Congressional basis for the Act and its constitutionality.⁷⁵ Similarly, the treaty power should not be construed too broadly so as to dilute its enforceability and integrity, but what is most relevant here is the assertion of the judicial capacity to make such a determination: “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”⁷⁶ Domestic courts should assert the same ability in determining the scope of the treaty power.

If a treaty creates rights that are the proper objects of a treaty and not inconsistent with the Constitution, then it is clear, from the above, that our Framers intended those rights to be binding on the States. The Framers expressed the importance of the ability of the United States to speak with one voice in its relations with foreign nations, and thus the

⁷⁴ See U.S. CONST. art.I., § 8 ,cl. 3.

⁷⁵ 529 U.S. 598, 599 (2000).

⁷⁶ *Id.* at 614.

power of the Executive and the Senate to treaty with foreign nations to bind the several States was deemed indispensable to the ability of the new nation to effectively manage foreign affairs. The nation's incorporating document should not be perverted to diminish the value of the above perspective simply because the U.S. is an infinitely more powerful nation in 2004 than it was in 1787.

B) OBLIGATORY TERMS OF TREATIES ARE NECESSARILY SELF-EXECUTING

Treaties that create obligations on states to act or not to act in certain ways toward nationals of contracting states necessarily create a right for those nationals within constitutional limits. This sort of treaty is "self-executing" to the extent that it creates those rights. In order to determine whether a treaty creates obligations on the contracting parties, one must look to the language of the treaty itself rather than rely on the supposed "intent" of one party to the agreement. If one party allows its unilateral intent to supersede the agreed-upon text of the agreement, then it will discourage other nations from negotiating with them, as well as encourage other nations to derogate from the terms of existing and future treaties with them. If the language of the treaty is hortatory as opposed to obligatory, then the treaty cannot have legal force in domestic courts without implementing legislation.⁷⁷

⁷⁷ See *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993) at 2551-52: "...[g]eneral humanitarian intent cannot impose un contemplated obligations on treaty signatories."

The effect of a treaty can, of course, be the basis for an act of Congress. Under Article I, Section 8, clause 18 of the U.S. Constitution, Congress has power to "make all the laws which are necessary and proper for carrying into execution, and all other powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." Congress can therefore enact legislation that is necessary to carry out the aspirations of a treaty that is properly made. Hortatory language in treaties therefore offers more flexibility to nations in deciding how far they want to go in carrying out the express goals of treaties. Considering this distinction in the treaty-making process makes it appear all the more as if a country that tries to characterize a treaty cast in obligatory

The Restatement of Foreign Relations Third has expressly recognized the inherently self-executing nature of treaty obligations.⁷⁸ One might think that the majority of the ICJ in *LaGrand* wrote Reporter's note 5 of section 111: "Provisions in treaties of friendship, commerce, and navigation, *or other agreements conferring rights on foreign nationals, especially in matters ordinarily governed by State law, have been given effect without any implementing legislation, their self-executing character assumed without discussion.*"⁷⁹ Indeed, the ICJ expressly construed a right for the LaGrand brothers out of the obligatory language of the VCCR.⁸⁰ In *U.S. v. Rauscher*,⁸¹ the Supreme Court characterized the Kentucky Court of Appeals' opinion as "very able" when it said:

When it is provided by treaty that certain acts *shall* not be done, or that certain limitations or restrictions *shall* not be disregarded or exceeded by the contracting parties, *the compact does not need to be supplemented by legislative or executive action*, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable all-sufficient reason, that to do so *would not only violate the public faith, but to transgress the 'supreme law of the land'*.⁸²

Furthermore, the Supreme Court agreed with the self-executing character of treaty-made obligations in *Asakura v. Seattle*, stating that no municipal ordinance or state law can interfere with the obligations of the

language as somehow "non-self-executing" is, in fact, trying to alter the terms of the agreement *ex post*.

⁷⁸ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS §111, reporter's note 5 (1987) (stating that "[o]bligations not to act, or to act only subject to limitations, are generally self-executing.>").

⁷⁹ *Id.* (emphasis added).

⁸⁰ See discussion *infra* Part II.B.

⁸¹ 119 U.S. 407, 427-28 (1886).

⁸² *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878) (emphasis added).

U.S. under its treaties.⁸³ The Vienna Convention on the Law of Treaties (hereinafter Vienna Convention) instructs us similarly.⁸⁴ Articles 26 and 27 make it clear that: 1) all treaties in force are binding; 2) treaties in force must be observed in good faith; and 3) States may not invoke provisions of its internal law as an excuse not to perform its treaty obligations.⁸⁵ This seems quite contrary to the position that the U.S took in its declaration to the COE Convention.⁸⁶

The relevant authority makes it clear that when one is interpreting the terms of a treaty to determine if the treaty creates judicially enforceable rights, the first inquiry must be to the language of the treaty itself.⁸⁷ If sovereigns agree to obligations to act or not to act towards individuals in a particular manner, then those individuals necessarily have the right to be treated in such a way. Once it is determined that an individual has a right under a treaty, the question then turns on whether this is a judicially enforceable right, and then whether there is a remedy. Domestic courts are reluctant to enforce treaty-based rights.⁸⁸

⁸³ See Asakura, *supra* note 64, at 341:

The treaty is binding on the State of Washington... The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing as supremacy as do the provisions of the Constitution and 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.

⁸⁴ Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/ 27, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm>.

⁸⁵ *Id.* at art. 26-27.

⁸⁶ See *supra* note 61.

⁸⁷ Vazquez notes that hortatory treaty provisions could be argued to be obligatory in the sense that the contracting parties have an obligation to act in good faith to comply with those aspirations. He also notes, and the author agrees, that “obligations of this nature do not give rise to correlative legal rights.” Nations have a right to expound their mutual ideologies for political reasons, or any reason at all, without fear of later being legally bound by them. See Vazquez, *supra* note 65, at 1123.

⁸⁸ *Id.* at 1082-1083.

**C) JUDICIALLY CREATED OBSTACLES: “SELF-EXECUTING”
VERSUS “NON-SELF-EXECUTING” TREATIES**

The 5th Circuit Court of Appeals has rightly described the “self-executing treaty” concept as “the most confounding [doctrine] in treaty law.”⁸⁹ The doctrine itself seemingly is used by the courts as another political question, and as one author has examined in detail, the two categories of non self-executing treaties correspond with the two categories of political questions.⁹⁰ Viewed in this light, it is clear that courts attempt to interpret treaty obligations the same way that they do constitutional and statutory provisions. This is why courts try to look at the intent of treaty-drafters to determine whether the treaty is “self-executing.” A treaty, however, is much more akin to a contract than it is to legislation because it is an agreement between two sovereigns who agree on bargained-for terms rather than a unilateral assertion of authority granted by the populous. Treaties should, therefore, be interpreted as contracts, not legislation. In light of this, it is inappropriate to look at the “intent” of the treaty drafters when interpreting the language of a treaty

⁸⁹ U.S. v. Postal, 589 F.2d at 876 (1979).

⁹⁰ Vazquez parallels “hortatory” treaty provisions to those statutory or constitutional provisions which do not afford judicially manageable standards, and are therefore unenforceable by the courts. He also parallels “executory” treaty provisions to legislation that delegates rule-making authority to an administrative agency. His conclusion is best quoted:

I do not here advocate any particular version of the political-question doctrine, nor do I contend that it provides an independent ground for refusing to enforce treaties that do not fit the first two categories of unenforceable treaty provisions described above. But I do propose that the parallels between the political question doctrine and the doctrine of self-executing treaties be recognized and that the tension between the latter doctrine and the status of treaties as “law” be resolved, as it is generally with constitutional provisions, *not by denying the provision’s status as law, but by determining whether there are overriding reasons to hold that what is prima facie a “law” is nevertheless unenforceable in the courts.*

See Vazquez, supra note 65, at 1120 - 1132 (emphasis added).

because, like all parties to a contract, each party is necessarily acting in their own self-interest. A look into the history of international prisoner transfer treaties will illustrate why U.S. courts should, as the Vienna Convention on the Law of Treaties instructs, adopt a parol evidence rule for treaty interpretation.⁹¹ the person interpreting the treaty must confine their interpretation to the text of the document itself unless the text is ambiguous or would lead to an absurd result, in which case they may turn to extrinsic evidence.

Turning to the constitutional limits of the treaty power, the Supremacy Clause says nothing about requiring implementing legislation in order to give force to treaties ratified by the Senate.⁹² However, domestic courts seem to interpret obligatory treaty provisions under the assumption that they cannot be given legal force unless the Executive has manifested some subjective intent to the contrary.⁹³ The Constitution, however, commands that the inquiry be to the contrary: a treaty that is obligatory in nature should be presumed to be self-executing unless it expressly requires implementing legislation. If a claim is brought under an obligatory treaty-provision which is beyond the scope of the treaty power, it would then be proper for domestic courts to declare it unenforceable because of its unconstitutionality rather than it being non-self-executing.

1. Treaties Are Contracts

⁹¹ See *supra* note 84.

⁹² See *supra* note 58.

⁹³ See *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir.1982); see also *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (1993); see also *Intel Containers Intern. Corp. v. Huddleston*, 113 S.Ct. 1095 (1993).

The fundamental cause of confusion within the courts in determining the domestic legal effects created by treaties is the courts' tendency to interpret treaty provisions as they would legislation. Accordingly, they are quick to turn to the *travaux préparatoires* of a treaty to determine whether it is self-executing even when the plain text of the treaty is express. However, the nature of the treaty itself and the dynamics of the treaty-making process are much more akin to that of an international *contract*, and its provisions should be interpreted accordingly.

The simplest way to compare and contrast the nature of treaties versus legislation is to examine their respective definitions.⁹⁴ The definition of legislation is “the exercise of the power and function of making rules (as laws) that have the force of authority by virtue of their promulgation by an official organ of a state or other organization.”⁹⁵ Such

⁹⁴ MERRIAM-WEBSTER DICTIONARY, at <http://www.m-w.com/>. (last visited March 5, 2003). Full entries read:

leg·is·la·tion

1. the action of legislating; *specifically* : the exercise of the power and function of making rules (as laws) that have the force of authority by virtue of their promulgation by an official organ of a state or other organization
2. the enactments of a legislator or a legislative body
- 3 a matter of business for or under consideration by a legislative body

tre·a·ty

1. The action of treating and esp. of negotiating
2. An agreement or arrangement made by negotiation: as
 - a. private treaty
 - b. A contract in writing between two or more political authorities (as states or sovereigns) formally signed by representatives duly authorized and usually ratified by the lawmaking authority of the state (the president...shall have power, by and with the advice and consent of the Senate, to make *treaties* - *U.S. Constitution* art. II) compare executive agreement
3. A document embodying a negotiated agreement or contract
4. An agreement or contract (as between companies) providing for treaty reinsurance

⁹⁵ *Id.*

an act is unilateral. Because the person or body legislating is *unilaterally* creating law, in their official capacity, with the supposed authority to do so, their intent is important in determining the meaning of ambiguous provisions of law. Unlike a treaty, a piece of legislation is not an agreement between parties. Legislation derives its power from the authority of the law-making body to issue it, and while it may constitute a compromise between divergent interests within that body, legislation affects only the governed, which has given the legislator authority to create laws without the specific consent of the governed. The governed, of course, have the power to remove the legislator and replace him or her with one who will better represent their interests. Parties to a treaty, like a contract, negotiate every term of the agreement whose four corners represent the scope of its power over their future actions.

The essence of a treaty as a negotiated instrument is clear from its definition.⁹⁶ The Merriam-Webster Legal Dictionary, in fact, offers one definition of a treaty as “a *contract* in writing between two or more political authorities.”⁹⁷ Because a treaty is an agreement between two or more parties, the intentions alone of the separate parties will not determine how the provisions of their agreement should be interpreted. However, U.S. courts have a tendency to look at the individual “intent” of the U.S. treaty-drafters in determining whether an obligatory provision should be deemed “self-executing” and therefore have any domestic legal effect. This approach of looking at the intent of an individual party in entering into a contract, when the plain language of the contract admits of no ambiguity, in order to determine the enforceability of that contract, is clearly at odds with fundamental principles of equity.

⁹⁶ *Id.*

⁹⁷ *Id.* (emphasis added).

Surely other nations should be able to rely on the obligations that the U.S. assumes in its treaties without having to worry about a potential unilateral defense that courts can create by examining the supposed “intent” of the American treaty drafters. If the perceived reliability of the U.S. to adhere to treaty obligations continues to deteriorate while U.S. courts fail to enforce those obligations domestically, then other treaty parties may feel compelled to rely on alternative enforcement methods. As in the domestic context, the manifestations of these results are unpredictable and, therefore, undesirable.

2. International Law Supports Contract Interpretation Method

Article 31 of the Vienna Convention on the Law of Treaties instructs the judicial organ interpreting a treaty to adopt the ordinary meaning of the terms within the treaty.⁹⁸ Only when the text of the treaty is either obscure, ambiguous or leads to a result, which is patently unreasonable, may the interpreting body look to supplementary means.⁹⁹ Section 325 of the Restatement of Foreign Relations acknowledges this as the internationally recognized and accepted method of interpreting an international agreement. “An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.”¹⁰⁰ The comments to this section of the Restatement make it clear that the tendency of U.S. courts to resort to *travaux preparatoires* in interpreting

⁹⁸ See Vienna Convention on the Law of Treaties, *supra* note 84, at art. 31.

⁹⁹ *Id.* at art. 32.

¹⁰⁰ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 78, §325 (1).

international agreements is inconsistent with the Vienna Convention.¹⁰¹ Such a method of interpretation could be argued as a breach of international law itself, but that is outside the scope of this article.¹⁰² What is important to notice here is that the Vienna Convention makes no mention of the subjective “intent” of the treaty drafters when discussing the proper mode of interpreting international agreements. Appropriately, the Restatement makes no mention of it either.

However, when one turns to section 111 of the Restatement, one is surprised to discover that the subjective intent of the United States is the determining factor in whether a treaty is self-executing and ultimately if its terms are enforceable in domestic courts.¹⁰³ Section 111 begins by reiterating the Supremacy Clause, asserting that international agreements of the U.S. are supreme law in the U.S. and dominant over the several states.¹⁰⁴ Subsection (3) goes on to say that the U.S. courts are to give effect to the international agreements of the U.S. unless they are “non-self-executing.”¹⁰⁵ Subsection (4) then provides three factors, each of which will fatally render a treaty “non-self-executing.”¹⁰⁶ The first of these

¹⁰¹ *Id.* cmts. e-f. The *travaux préparatoires* (French for “preparatory works”) are the explanatory documents and requests submitted by the potential parties to the treaty commission during the treaty-drafting process.

¹⁰² Though the U.S. has not ratified the Vienna Convention, it is has arguably become binding on all Nations as customary international law. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS 2001-2002 EDITION (Aspen Law & Business 2001).

¹⁰³ *Supra* note 78, § 111 cmt. h.

¹⁰⁴ “International law and international agreements of the United States are law of the United States and supreme over the law of the several states.” *Id.* § 111(1).

¹⁰⁵ “Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a “non-self-executing” agreement will not be given effect as law in the absence of necessary implementation.” *Id.* § 111(3).

¹⁰⁶ The three factors are:

- (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation,

factors seems to be the source of the “subjective intent” analysis: “if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation.”¹⁰⁷

How the subjective intent of the U.S. treaty-drafters is related to subsection (4)(a) is not clear. To say that an “agreement” must “manifest an intention” is not instructive to an analysis of the subjective intent of the treaty-drafter. Even from the plain language, analyzing it from a grammatical standpoint, the word “agreement” is the subject of the verb “manifest,” which takes the noun “intention” as its direct object. The “agreement” referred to in subsection (4) (a) is presumably the “international agreement” that begins the subsection. The treaty is the subject of the sentence and is performing the action of the verb. The subject of a transitive verb must perform some action upon the verb’s object. A treaty can only “manifest” an “intention” in one way: by expression in written words. Assuming subsections (b) and (c) are met,¹⁰⁸ the inquiry as to whether a treaty is self-executing under sub (a) simple: if the treaty does not expressly provide for implementing legislation, then none should be required to give it legal effect.¹⁰⁹ It is important to note the presumption of self-execution expressed in section 111 by looking at it as a whole: subsection (1) says that international law is supreme law of the

(b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or

(c) if implementing legislation is constitutionally required.

Id. § 111(4).

¹⁰⁷ *Id.* § 111(4)(a).

¹⁰⁸ Subsection (b) implicates the “later-in-time” rule by addressing a Congressional resolution, but this issue has been explored extensively by other authors. See Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT’L. L. 313, 313-324 (April, 2001). For a discussion of the implications of subsection (c), see *infra* Part IV.A.

¹⁰⁹ *Supra* note 78, § 111(4)(a).

land; subsection (2) says that cases arising under international law are within the jurisdiction of U.S. courts; subsection (3) says that courts are bound by our international agreements *unless* those agreements are non-self-executing; and subsection (4) delineates the three factors used to determine whether a treaty is non-self-executing.¹¹⁰ Section 111 makes non-self-executing treaties the *exception* rather than the rule, so domestic courts should evaluate obligatory treaty provisions as *prima facie* self-executing. But comment (h) to Section 111 is very clear about what the drafters of the Restatement meant by an agreement “manifesting an intention”:

In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. *Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States... If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement... Whether an agreement is or is not self-executing in the law of another state party to the agreement is not controlling for the United States.*¹¹¹

It is difficult to determine what about this comment is most perplexing: the fact that it contradicts and undermines the Vienna Convention on the Law of Treaties, general principles of equity, or the Restatement itself.¹¹²

¹¹⁰ See *supra* note 78 at § 111.

¹¹¹ *Id.* cmt. h (emphasis added). This comment is titled: “Self-executing and non-self-executing agreements.”

¹¹² It is important to note that while the U.S. has not ratified the Vienna Convention, as of September 2000, 90 other countries had. Therefore, the Vienna Convention is the most persuasive authority on the international legal norms for the interpretation of international agreements in existence today, notwithstanding the failure of the U.S. to ratify it. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS 2001-2002 EDITION (Aspen Law & Business 2001).

Comment (h) expressly contradicts the section on which it purports to comment.¹¹³ The plain language of section 111 clearly creates a presumption in favor of finding a treaty self-executing in absence of a manifest intention otherwise. However, this comment reverses that presumption because it explains that if a treaty is “silent as to its self-executing character,” then the interpreting body must analyze the intention of the Executive or the Senate.¹¹⁴ The comment exacerbates this deviation from its own rule by explicitly expressing that the intention of the U.S. is dispositive in determining whether a treaty is self-executing.

This inconsistency is nothing more than a microcosm of how domestic courts have been avoiding the enforceability of treaty provisions. This inconsistency between section 111 and the comment to this section demonstrates the current state of domestic affairs: domestic courts are generally in violation of both international and domestic law with regards to domestically enforcing international agreements by using subjective intent to determine whether an obligatory treaty provision is enforceable.

An examination of the history of international prisoner transfer treaties will serve to illustrate why the intention of the parties entering into a treaty cannot control how the treaty is implemented domestically. The reason is simple and it is the same reason why the parole evidence rule exists: sovereign entities will primarily act in their own self-interest, so their subjective intention cannot be used to define the scope of agreements between themselves and other sovereigns.

¹¹³ See discussion *infra* Part IV.C.2..

¹¹⁴ See *supra* note 78, § 111 cmt. h.

3. Analysis of Subjective Intent Is Neither Useful nor Appropriate

The historical perspectives concerning the ultimate purposes behind the different prisoner transfer treaties to which the U.S. is a party fail to be cohesive, but they are relevant in order to illustrate why the subjective intent of the parties regarding the treaties' domestic enforceability should not be controlling. For all of the different political motivations that are cited as to why the U.S. plowed the path for international prisoner transfer treaties, the common denominator in all of these treaties is their purported purpose as defined explicitly in each treaty: to further the rehabilitation of the prisoner.¹¹⁵

It is well-recognized that the most important reason that the U.S. began negotiating these types of prisoner transfer agreements was because of the pressure put on the State Department by relatives of Americans who

¹¹⁵ MICHAEL ABBELL, INTERNATIONAL PRISONER TRANSFER, pg. 1-9, Transnational Publishers, Inc. Ardsley, NJ (2002).

See also, Guidelines for Evaluating Prisoner Applications for Transfer, at <http://www.usdoj.gov/criminal/oeo/guidelines.html> (last visited March 20, 2005). This is the official statement of the Attorney General regarding the purpose of these treaties and what criteria should be used in determining the eligibility for transfer. The following excerpt demonstrates that the Attorney General's interpretation of these treaties views social rehabilitation of the prisoner as their primary purpose:

(1) Likelihood of social rehabilitation.

Beyond the practical concerns of alleviating prison crowding and dealing administratively with foreign national prisoners, many of whom have very limited English language ability, *the central rationale behind transferring foreign prisoners to their home countries is to facilitate the prisoner's social rehabilitation. Rehabilitation is, of course, one of the principal purposes of incarceration in civilized societies.* This goal is expressly stated in the Preambles to most of the prisoner transfer treaties ("to provide better administration of justice by adopting methods furthering the offender's social rehabilitation," [Mexican treaty]; "facilitating [the prisoner's] successful reintegration into society," [Canadian treaty]; "*further the ends of justice and social rehabilitation of sentenced persons,*" [COE Convention]). Prisoner transfer assumes that such social rehabilitation is more likely to occur in the prisoner's home country, closer to his family and within his own culture. In addition, since many foreign national prisoners will be deported when

were imprisoned in South and Central American countries.¹¹⁶ Bolivia is the most noteworthy in this regard. In 1977, there were 35 young Americans imprisoned there, held on various narcotics charges. Many of these detainees had been held for years without ever being tried.¹¹⁷ Relatives of these young people formed a lobby group in Washington D.C. and succeeded in attracting enough attention and publicity to make prisoner transfer rights a priority for the State Department.¹¹⁸ Indeed, Vice President Walter Mondale wrote, in a letter to the Cyrus Vance, Legal Advisor for the State Department at the time, “I wanted to call the case to your personal attention to underscore the concern to these parents and relatives and their hope that a solution satisfactory to all can be found as soon as possible.”¹¹⁹

A three-man team was sent to Bolivia to investigate the situation of Americans being detained and possible ways to get them returned to the jurisdiction of the U.S.¹²⁰ The team consisted of Gordon Baldwin, professor of law at the University of Wisconsin School of Law who was also working as a contractor for the State Department at the time, Sam Moscowitz, a foreign service officer, and Louis Fields, a State Department

their sentences have been served, *it may not make sense to further their adjustment to a society in which they will not be allowed to remain after release.* (emphasis added).

¹¹⁶ See *supra* note 115 at 1-7..

¹¹⁷ Gordon B. Baldwin, *Americans in Bolivian Sails*, THE GARGOYLE ALUMNI BULLETIN OF THE UNIVERSITY OF WISCONSIN LAW SCHOOL, Vol. 8 No. 4 (1977) (On file with Professor Gordon Baldwin Evjue-Bascom Emeritus Professor of Law, University of Wisconsin Law School).

¹¹⁸ Conversation with Professor Gordon B. Baldwin, Evjue-Bascom Emeritus Professor of Law, University of Wisconsin Law School (November 18, 2002).

¹¹⁹ Letter from Walter Mondale, Vice President of the U.S., to Cyrus Vance, Secretary of State (Feb. 11, 1977) (on file with Professor Gordon Baldwin at the University of Wisconsin Law School).

¹²⁰ See Baldwin, *supra* note 117 at 10.

lawyer.¹²¹ The team reported that while there was no evidence of American prisoners being discriminated against in any way, the lack of a developed prison or judicial system led to grotesque physical conditions and periods of detention pending trial that could be viewed as a violation of due process.¹²² As Professor Baldwin noted in a conversation with this article's author, the State Department's motivation in drafting these treaties was primarily to get Americans out of prisons in underdeveloped countries.¹²³ At the time, he noted, there was little concern in Washington about the status of foreign nationals incarcerated in the U.S.¹²⁴ Professor Detlev Vagts, who drafted and negotiated these prisoner transfer instruments upon Professor Baldwin's return to the University of Wisconsin Law School, related the same intention of the U.S. in negotiating these agreements.¹²⁵ Professor Vagts also added that the intention of the U.S. was not only to get U.S. citizens out of foreign prisons and back onto U.S. soil, but also to specifically negotiate these treaties so as to allow Americans to be furloughed upon their return to the U.S.¹²⁶ This is ironic because, currently, the biggest concern the U.S. has regarding the transfer of foreign nationals back to their home country is the retaining the assurance that those nationals will actually serve out their sentences if they are returned.¹²⁷

¹²¹ *Id.*

¹²² *Id.*

¹²³ See Conversation with Professor Gordon B. Baldwin, *supra* note 118.

¹²⁴ *Id.*

¹²⁵ Telephone conversation with Professor Detlev F. Vagts, Bemis Professor of International Law, Harvard Law School (Oct. 28, 2002).

¹²⁶ *Id.*

¹²⁷ The Attorney General's Guidelines for Evaluating Prisoner Applications for Transfer demonstrates this point:

(2) Law enforcement concerns.

History does not speak to the role of rehabilitation as the primary purpose of our early bilateral treaties. Mexico, for example, was being widely criticized in the 1970's for its negative treatment of American prisoners, and so it encouraged a treaty with the U.S. in order to alleviate the adverse effect that this bad publicity was having on its tourism.¹²⁸ The U.S.' treaty with Panama was necessary in order to give Panama jurisdiction over the prisoners in the formerly U.S. controlled Canal Zone. This was executed by transferring the prisoner to Panamanian custody rather than transfer them to a U.S. prison.¹²⁹ A prisoner transfer treaty with Canada was convenient because of close diplomatic and law enforcement relations as a consequence of geographic proximity.¹³⁰

Social rehabilitation is not the only purpose of incarceration, and therefore cannot be the sole consideration in evaluating prisoner transfer requests or take precedence over all other objectives. Law enforcement and justice concerns must also be considered, regardless of the possible consequences for the prisoner's social rehabilitation. These considerations are the normal ones in any sentencing or parole decision:

- (e) Possible sentencing disparity. When a prisoner is transferred, responsibility for administering his sentence belongs exclusively to the receiving country. Under most of the bilateral treaties, the receiving country takes over the transferred sentence, but that sentence is then carried out under the laws and regulations of the receiving country, including any provisions for reduction of the term of confinement by parole, conditional release, good time release, or otherwise. Under the French and Turkish bilateral treaties and the COE Convention, the receiving country has the additional option of converting the sending country's sentence, through either a judicial or administrative procedure, into its own sentence; that is, the receiving country may substitute the penalty under its own laws for a similar offense. (There are certain limitations on converting the sentence. The receiving country is bound by the findings of facts insofar as they appear from the judgment, cannot convert a prison term into a fine, and cannot lengthen the prison term.) However, regardless of whether the sentence is continued or converted, responsibility for administering it rests solely with the receiving state.

See Guidelines for Evaluating Prisoner Applications for Transfer, at <http://www.usdoj.gov/criminal/oeo/guidlines.html> (last visited March 20, 2005).

¹²⁸ *See* ABBELL, *supra* note 115 at 1-7.

¹²⁹ *Id.* at 1-6.

¹³⁰ *Id.* at 1-7.

The COE Convention expressly states that furthering the rehabilitation prisoners was one of its primary goals.¹³¹ Due to geography, the European situation in regards to foreign prisoners was much different from that of the U.S. in the 1960's and 1970's. For example, in some European countries, more than 30% of all prisoners were foreigners.¹³² The U.S. did not suffer this burden of housing such a large percentage of other countries' nationals.¹³³ Besides the obvious problem of cost, there are administrative difficulties that need to be addressed with foreign prisoners.¹³⁴ A staff that speaks the language of these prisoners must be on hand and consideration must be given to their different cultural and dietary needs.¹³⁵ So not only is the sentencing country taking on a financial burden by housing more prisoners, but those additional prisoners actually cost significantly more because of the additional administrative expenses.¹³⁶

Officials of some European countries also expressed concern about the treatment of foreign prisoners in European prisons.¹³⁷ Their complaint was essentially that foreigners were generally discriminated against and so their life in prison was much more difficult than ordinary prison life.¹³⁸ All

¹³¹ See *supra* note 2.

¹³² See ABBELL, *supra* note 115 at 1-7.

¹³³ *Id.* It is interesting to note that the situation is quite different in the U.S. today. As of January 2002, about 30% of the federal inmate population was foreign nationals. About 54% of those foreign nationals were Mexican nationals. See *id.* at 10.

¹³⁴ *Id.* at 15.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ ABBELL, *supra* note 115, at 15.

of these problems led to the desire for a European prisoner exchange program of some sort, and ultimately the COE Convention.¹³⁹

In 1962, a subcommittee of the Council of Europe in the European Committee on Crime Problems (ECCP) began work on the European Convention on the International Validity of Criminal judgments in order to facilitate the development of an exchange program between European nations.¹⁴⁰ This program is ultimately considered a failure because of several inadequacies, including its cumbersome complexity, its requirement that only the sentencing country could request a transfer, and the reality that the Convention could impose a transfer on a prisoner against his will.¹⁴¹ Indeed, considering the last two of these issues, it does not seem that the Convention had the rehabilitation of the prisoner foremost in mind. Rather, it appears that the Convention was more concerned with giving the sentencing country the right to expel an undue burden.

Because very few countries ratified the treaty and very few prisoners were transferred under it, the problems that existed before the Convention existed very much after its ratification.¹⁴² Consequently, in 1979 the ECCP considered giving a European prisoner exchange program another try by considering “the possibility of drawing up a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member states or by member states in their relations with non-member states.”¹⁴³ The failure of the former Convention and the success of the U.S. in fashioning and implementing

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1-9.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

bilateral prisoner transfer treaties with Canada and Mexico prompted the Ministers of the Council of Europe to invite the U.S. and Canada to act in an advisory role in the negotiations at COE.¹⁴⁴ The negotiations ultimately led to the Convention on the Transfer of Sentenced Persons, which was fundamentally modeled on the bilateral treaties of the U.S. As of November 24, 2002, 40 of the 43 members of the Council of Europe had signed the treaty into force. These countries include Australia, Bahamas, Canada, Chile, Costa Rica, Israel, Panama, Trinidad and Tobago, the United States, and Yugoslavia.¹⁴⁵ The success of the COE Convention ultimately led to the Inter-American Convention on Serving Criminal Sentences Abroad, which was opened for signature in 1993.¹⁴⁶ As of November 24, 2002, this treaty was in force for Brazil, Canada, Chile, Costa Rica, Mexico, Nicaragua, Panama, the United States, and Venezuela.¹⁴⁷

While it is obvious when looking at these treaties in their historical context that their primary motivations were political rather than humanitarian, the motivations of the treaty-drafters should not be controlling in determining the extent of the treaty's enforceability. The U.S. should not release all Americans who are returned to U.S. custody from Bolivia even though it was the "intent" of the U.S. when was drafting that bilateral treaty. Clearly the principle of reciprocity did not allow the U.S. to bargain for a term that would allow the U.S. to release all of its nationals upon their return to native soil while simultaneously

¹⁴⁴ ABBELL, *supra* note 115, at 1-9.

¹⁴⁵ See Council of Europe, List of Signatories and Ratifications for ETS Number 112, at <http://conventions.coe.int/Treaty/EN/Treaties/Html/112.htm>. (last visited March 20, 2005).

¹⁴⁶ *Id.*

¹⁴⁷ See Inter-American Convention on Serving Criminal Sentences Abroad, at <http://www.oas.org/juridico/english/sigs/a-57.html> (last visited Nov. 24, 2002).

ensuring that other parties to the treaty would honor sentences imposed on their nationals by the U.S. Such a patently inequitable agreement could not be motivated by the principles of free contract, but more likely by principles of extortion and coercion. Accordingly, the U.S. should not unilaterally assert its own intentions to limit the domestic enforceability of these international agreements.

V. **Ex Parte Young: A Tool to Compel State Compliance with Treaty Obligations**

It is necessary that U.S. courts enforce its treaty obligations under the COE Convention for two fundamental reasons: 1) to promote the rehabilitation of foreign prisoners and 2) to promote international comity and thereby encourage reciprocal treatment of detained American nationals abroad. As demonstrated throughout this article, the U.S. has an express obligation to promptly inform foreign nationals of parties to the COE Convention of their rights under that treaty, those nationals who are detained in U.S. federal and state prisons have a right to be so informed.¹⁴⁸ No evidence currently is available that shows the federal government is in breach of this obligation, but the individual states that comprise this nation are frequent violators. Federal courts should utilize the *Ex parte Young* doctrine to overcome state sovereign immunity and allow foreign nationals to seek prospective relief from state officials to ensure future state compliance.¹⁴⁹

¹⁴⁸ See discussion *infra* Part II.

¹⁴⁹ See *Young*, *supra* note 3, at 155-156:

The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten or are about to commence proceedings, either of a civil or criminal nature, to enforce against parties an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action.

Suits against a state or a state official are normally barred by the principle of sovereign immunity, but the doctrine of *Ex parte Young* is the judicially created exception to the 11th amendment¹⁵⁰ which is used to vindicate the supremacy of federal law established by the Constitution.¹⁵¹ The *Young* doctrine dictates that while federal courts are unable to directly command states as states, they do have the power to “enjoin state officials in their official capacities.”¹⁵² The Supreme Court has mandated the use of a simple, two-part test to determine whether such a complaint survives the sovereign immunity defense: 1) there must be a violation of federal law, and 2) prospective relief must be sought.¹⁵³

The inadequacy of state implementing legislation is evidence of the failure of the U.S. states to comply with the terms of the treaties. Though the rights created under the COE convention and other prisoner transfer treaties are clearly self-executing in nature, federal and state-implementing legislation has been enacted to provide the necessary statutory machinery to carry out the obligations under these treaties and their deficiency serves as additional evidence of state non-compliance. With few exceptions, they are skeletal in substance and clearly fail to

This doctrine has since been expanded to include all federal law, not just federal constitutional law. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 122 S. Ct. 1753, 1760 (2002).

¹⁵⁰ U.S. CONST. amend XI: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”

¹⁵¹ *See* U.S. CONST. art. VI, cl. 2.

¹⁵² *See Hutto v. Finney*, 98 S. Ct. 2565, 2573. (1978).

¹⁵³ *See Verizon*, *supra* note 149, at 1760: “In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” (quoting *Idaho v. d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)).

address the prisoner's right to notification.¹⁵⁴ One commentator has noted that "simply put, many of the U.S. states' [implementing] legislation does not encourage or actively facilitate the transfer of prisoners under the transfer treaties....[t]he failure to notify eligible prisoners of the possibility of transfer contravenes the transfer treaties."¹⁵⁵ Currently, only five states have implementing legislation that *requires* correctional officers to inform foreign nationals of their right to transfer.¹⁵⁶ Also recall that the 1997 declaration of the U.S. to the COE Convention concedes that: "there are

¹⁵⁴ Wyoming's transfer statute is a good example of a typical state statute:

7-13-106. Transfer of citizen or national of foreign country.

The governor may act on behalf of the state to consent to the transfer of a citizen or national of a foreign country pursuant to a treaty between the United States and the foreign country of which the person is a citizen or national." See WYO. STAT. ANN. § 7-13-106.

In contrast, New Jersey law provides extensive guidelines on the authority of the state to authorize transfer and the prisoner's eligibility therein, but nowhere obligates correctional authorities to notify a prisoner of their right to transfer. See Subchapter 6, Subtitle 5B International Transfers, Chapter 7D Prisoner Transfer Treaties, Subchapter 6, International Transfers 10A:10-6.1 – 10A:10-6.9.

To see most of the state implementing legislation that exists, visit Individual State Prisoner Statutes, at <http://www.usdoj.gov/criminal/oeo/prisonert.htm>, (last visited March 20, 2005).

¹⁵⁵ See Finkelstein, *supra* note 59, at 153.

¹⁵⁶ Those states are Kentucky, *see* KY. REV. STAT. ANN. § 196.073 (1994), *see also* Kentucky Corrections, Policies and Procedures, International Transfer of Inmates, Policy number 18.18 § V.A. (1995); Massachusetts, *see* MASS. GEN. LAWS ch. 578 § 97B (1985), *see also* MASS. REGS. CODE tit. 103, § 462.07 (1985); New York, *see* N.Y. CORRECT.LAW 71 (1-a); Washington, *see* WASH. REV. CODE § 43.06.350 (1985), *see also* WASH. ADMIN. CODE § 137-67-025; and California, *see* CAL. PENAL CODE § 2912 (West Supp. 1997). The Washington Administrative Code section 137-67-025, entitled "initial notification" provides for timely notification of inmates:

At the time of admission to the Washington corrections center, or the Purdy corrections center for women, the orientation information given to all inmates will include information on international offender transfers. An inmate who is a citizen of a treaty nation *will be informed* of the existing treaty and be provided with the opportunity to indicate an interest or non interest [sic] in a transfer to the inmate's country of origin or citizenship on an application form provided by the department. Whenever possible, the form will be bilingual or translated into the inmate's native language. The application will be processed *consistent with the purpose and provisions of the applicable treaty* (emphasis added).

some states which authorize few, or no, transfers *notwithstanding the statutory authority to consent.*"¹⁵⁷

The obligation to inform foreign national detainees is absolutely necessary in order for the treaty to achieve its express goal of promoting rehabilitation and for the same reason that the U.S. is obligated to inform foreign nationals of their right to consular access under the VCCR: the detainee must be aware of his rights in order to exercise them. To put this in perspective, the reader must imagine the typical situation of a foreign national arrestee who is eligible for transfer. The detainee is are likely to be completely ignorant of international legal norms, rights to consular access, and the other mechanisms that nations have constructed to encourage international comity and the development of basic human rights. He was probably raised in an economically depressed country with little or no education, but out of desperation decided to try his luck working in a more affluent nation, but with no intention of permanent immigration. The people most important to him probably remained in his native country. It is very typical for husbands to leave their wives and children for months or years at a time, returning home after they have accumulated however much money they were able to save. Of course, these circumstances do not justify the commission of whatever felony ultimately causes that person to be arrested, convicted, and sentenced to prison, but the prisoner transfer treaties were drafted with the understanding that civilized nations strive to rehabilitate prisoners,¹⁵⁸ and

¹⁵⁷ See *supra* note 61, available at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=8&DF=30/01/05&CL=ENG&VL=1>.

¹⁵⁸ See COE Convention, *supra* note 2 see also Mission Statement of the Federal Bureau of Prisons, which reads: "It is the mission of the Federal Bureau of Prisons to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities *to assist offenders in becoming*

that this goal is seriously undermined if someone is forced to remain incarcerated while completely removed from a familiar society. It is also important to remember that only prisoners with low culpability are likely candidates for transfer, and they are the best candidates for rehabilitation. Prisoners are more likely to facilitate their own rehabilitation and social reintegration if they have a tangible motivation to do so, i.e., they are near to the people who care for them in a familiar culture. One can imagine the terminal negative impact that 10 years in prison would have if one could not effectively communicate and did not have a single visitor during that time.

These are the problems that the COE Convention and other international prisoner transfer treaties seek to ameliorate, but they cannot be effective unless the individuals that the treaties are designed to benefit are aware of them. That is why these treaties create an obligation for the sending State to promptly inform the national of his or her rights pursuant to their terms, and consequently, why it is so important that domestic courts see to it that those rights are protected. *Ex Parte Young* is the tool that district courts should use to accomplish this.¹⁵⁹

A foreign national of a member country to the COE Convention, who was not notified of their right to apply for a transfer back to their home country, has clearly suffered an injury in violation of federal law and therefore satisfies the first prong of the test. The detainee would be precluded from retrospective relief, such as money damages, but money damages do not seem to be an appropriate remedy in this context irrespective of that limitation. Money damages are inappropriate because it fails 1) to further the rehabilitation of the prisoner, and 2) promote

law-abiding citizens”, at <http://www.bop.gov/> (last visited Feb. 5, 2003) (emphasis added).

¹⁵⁹ See *supra* note 149.

international comity. The specifics concerning the type of provisional remedy sought and precisely which state officials could be brought as defendants are more complex issues of domestic civil litigation and thus beyond the scope of this article.

It should be noted, however, that the *Young* doctrine has been interpreted to give the courts a great deal of power to penalize the states for failure to comply with federal law.¹⁶⁰ If a foreign national was successful in securing some type of prospective relief that sought to bring the state in compliance with the terms of the COE Convention, but the state continued to be deficient, the federal court could impose large financial penalties or even hold the state in contempt.¹⁶¹ This would undoubtedly be viewed as a bold assertion of judicial power, but its impetus would be nothing more than the application of the most ordinary meaning of the Constitution and U.S. treaty obligations taken together, and such an application should be seized upon if the opportunity is presented. As Justice Harlan noted in *Chew Hong v. United States* “[a]side from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, ... the honor of the government and people of the United States is involved in

¹⁶⁰ See Hutto, *supra* note 152, at 2573-74.

¹⁶¹ See *id.* The strength of the court’s language tells of no ambiguity:

The present case requires application of that principle. In exercising their prospective powers under *Ex parte Young* and *Edelman v. Jordan*, federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties. If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief (emphasis in original).

every inquiry whether rights secured by such stipulations shall be recognized and protected.”¹⁶²

Of course, the current Supreme Court may not allow the federal courts to undermine federalism in this manner ostensibly. Such a position would be unfortunate, for while the author is a proponent of the federalist structure of the U.S. government and the importance of the protections that this divided republic ensures individual liberty, he does not believe that the Constitution allows the states to diminish the ability of the U.S. to effectively manage its foreign relations. The reluctance of domestic courts to enforce U.S. treaty obligation *per se* undermines the ability of the courts to enforce the power of the Executive and the Senate to effectively manage our foreign relations while the frequency of state governments engaging directly in foreign affairs is increasing.¹⁶³ This problem is severely exacerbated by the increasing perception that the U.S. does not respect the rule of international law. The principles of international comity and the desire for reciprocal treatment of U.S. citizens abroad should encourage domestic courts to enforce treaty obligations in order to help diminish these problems.

Many commentators have addressed the problem of foreign distrust of the United States and the problems that it could pose for American citizens abroad and the rule of international law generally. Samuel Berger, former National Security Adviser to President Clinton, summarizes the issue:

...when our goals are embodied in binding agreements, we can gain international support in enforcing them when they are violated. By the same token, nothing undermines U.S. authority more than the perception that the United States

¹⁶² 112 U.S. at 540 (1884).

¹⁶³ See Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L. L. 821 (October, 1989).

considers itself too powerful to be bound by the norms we preach to others.¹⁶⁴

Professor Detlev Vagts noted in a 2001 article that recent treaty controversies have been provoking “serious resentment abroad,” and further noted that “...the executive, Congress, the courts, and influential commentators have each conspicuously verbalized the idea... that the binding effect of international law carries little weight. This attitude, at a time when many foreigners distrust the United States as too powerful and too aware of that power, jeopardizes the conduct of our foreign affairs.”¹⁶⁵

Surely what is most disturbing about Prof. Vagts’ comment is that it was made before the Bush administration’s unilateral initiative to attack Iraq with or without the consent of the U.N. Security Council.¹⁶⁶ The U.S. is setting a poor example as the only remaining superpower in the world, for if other nations cannot rely on the U.S. to respect international law as binding then it is unlikely that other nations are going to honor the claims of the U.S. when it is invoked by the U.S. It has taken human civilization a very long time to come to Article 2, paragraph 4 incorporated into an internationally “binding” agreement such as the UN Charter, which is why

¹⁶⁴ Samuel R. Berger, *Foreign Policy for a Democratic President*, 83 No. 3 FOR. AFF. 47, 52 (May/June 2004).

¹⁶⁵ See Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT’L. L. 313, 313, 329-330 (April, 2001). Professor Vagts specifically noted that the first case brought before the ICJ where the U.S. had executed a foreign national who had not been notified of his right to consular access provoked serious resentment abroad. See Vienna Convention on Consular Relations (Paraguay v. U.S.), 1998 I.C.J. 99 (Nov. 10) (case removed from the court’s list at the request of Paraguay).

¹⁶⁶ See Neil MacFarquar with Patrick E. Tyler, *Iraq Issues U.N. Demands and Destroys More Missiles*, N.Y. TIMES, March 9, 2003, International: “Both at the United Nations and in Washington, diplomats and Bush administration officials expressed growing concern that if the United States called for a vote on the resolution and lost it, the coalition led by the United States and Britain would go to war in apparent defiance of the Security Council.” In light of this recent controversy, it seems appropriate to point out that one of the failures by the U.S. to implement a treaty that Professor Vagts points out in his article is the U.S.’s arrears on U.N. dues. See *supra* note 165.

the Charter, like all other international obligations, should be given legally binding effect.¹⁶⁷ As another commentator noted in a 1998 article commenting on the failure of the U.S. to enforce its treaty obligations under the VCCR in *Breard*: "...the Executive can also be far more vigilant in seeking compliance with the [VCCR]. Its claims before our courts portend miserable representation of U.S. citizens abroad."¹⁶⁸

Because the states are "major sources of treaty violations,"¹⁶⁹ the proper exercise of judicial power to assert the supremacy of federal law over the states inherent in our treaty obligations would serve to increase international comity and reciprocal treatment of Americans abroad. Surely this type of authority would serve to ultimately ensure, at the very least, that states would adopt policies and procedures commensurate with the nation's treaty obligations. Perhaps, even more importantly, it would encourage U.S. treaty drafters to take more care in drafting treaty obligations. This solution is ideal because the U.S. would be improving its foreign relations by both its internal and external procedures.

VI. CONCLUSION

The United States has provoked serious resentment abroad because the federal courts have been unwilling to enforce the unambiguous terms of U.S. treaty obligations on the States even though the Constitution and current international legal norms clearly mandate the authority and responsibility to do so. Domestic courts have created obstacles to enforcement of treaty-based rights in order to avoid the uncertainty inherent in interpreting international law and to protect the federalist

¹⁶⁷ U.N. CHARTER art. 2, para. 4, 59 Stat. 1031, T.S. No. 993, 3 Bevens 1153: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state..."

¹⁶⁸ Jordan J. Paust, *Breard and Treaty-Based Rights under the Consular Convention*, 92 AM. J. INT'L. L. 691, 697 (October, 1998) (emphasis added).

¹⁶⁹ See Vagts, *supra* note 165, at 330-331.

structure of our republic where no such protection is needed or was intended. This problem has been recently exacerbated by assertions of unilateral authority by the executive branch in violation of our UN Charter obligations. Federal courts should use the opportunity to assert federal supremacy in the area of foreign relations by clearly defining its boundaries within constitutional limits. This approach to treaty interpretation would not damage either sphere of sovereignty, but rather it would promote the ability of the United States to effectively manage its foreign affairs by limiting the ability of the States to breach our international compacts, which is a power they were never intended to have. This could ameliorate some of the damage done to our international reputation in recent years, but time is running short. The United States not only needs to assert the ability to speak with one voice, but we need to ensure that this voice speaks in support of the rule of law.