2004

Self-Executing Treaties and Domestic Judicial Remedies

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delegations to those institutions more consistent with federalism. Insofar as delegating to international institutions redistributes national legislative authority, and in a fashion that is difficult to retract, it may be conceived as a bulwark against the concentration of political power that is consistent with the ambitions of federalism. If international law's inroads against the several states is considered, so too should we assess its potential for checking excessive authority in the national government, even if that checking function is performed more by foreign governments and foreign citizens than by more local— and increasingly, ineffectual—agents.

None of this is to suggest that delegation concerns will be resolved in the near future; the U.S. position is simply too ambivalent. On the one hand, the United States is obsessed with the notion of national sovereignty and a leader in its respect for democratic governance in domestic matters. At the same time, it has historically prospered in international institutions not just because it has been judicious in its engagements, but also because it is unusually powerful—in short, because the antidemocratic, unaccountable character of international governance serves its interests to a substantial degree. Given this tension, and the arc of globalization, it is likely that delegation issues will surface with greater frequency, and with greater salience, overcoming any continuing resistance to their fullest consideration.

SELF-EXECUTING TREATIES AND DOMESTIC JUDICIAL REMEDIES

by David Sloss[*]

At a meeting of this Society more than fifty years ago, Myres McDougal claimed: "[T]his word 'self-executing' is essentially meaningless, and . . . the quicker we drop it from our vocabulary the better for clarity and understanding."[1] Unfortunately, the fog of confusion surrounding the term has only thickened in the past fifty years.

When courts and commentators use the term "self-executing" to refer to treaties, they often conflate questions of international law with questions of domestic law. For example, the Restatement says that a treaty is non-self-executing if it "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation."[2] This formulation conflates two very different issues: whether a treaty is executory (a question of international law) and whether it has the status of law domestically in the absence of implementing legislation (a question of domestic constitutional law).

In *Foster v. Neilson*,[3] Chief Justice Marshall held that Article 8 of an 1819 treaty with Spain was executory as a matter of international law because it created an international legal obligation to convey property in the future; it did not create an international legal obligation to convey property immediately upon ratification.[4] In accordance with Justice Marshall's analysis, a treaty is not "executory" if it creates an international obligation that takes effect immediately upon entry into force of the treaty.

Whether a ratified treaty has the status of law in the United States in the absence of implementing legislation is an entirely different question, one of domestic constitutional law not international law. Even so, courts often attempt to answer this question by examining the words of a treaty to discern whether the drafters intended the treaty to have the status of law in the United States in the absence of implementing legislation. (The political branches sometimes

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[1] Myres McDougal, *Remarks at the Annual Meeting of the American Society of International Law (Apr. 27, 1951)*, 45 ASIL PROC. 101, 102 (1951).

[2] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §111(4)(a) (1987).

[3] 27 U.S. (2 Pet.) 253 (1829).

[4] *See* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 19–24 (analyzing *Foster*).

avert this problem by insisting on enacting implementing legislation before ratification. Here, I address only those treaties that are ratified without implementing legislation.) The courts' attempts to discern the treaty makers' intentions on this point are misguided; the question of a treaty's status within the domestic U.S. legal system is controlled by the Constitution, not the treaty makers.[5]

To clear away the confusion surrounding the doctrine of self-executing treaties, it is helpful to distinguish among three discrete issues that courts often combine under the self-execution label. The first is whether a particular treaty provision has the status of law within the domestic legal order. The supremacy clause states expressly that all treaties "made under the authority of the United States shall be the supreme Law of the Land."[6] Therefore, all duly ratified treaties have the status of domestic law in the United States, except for specific provisions that are not "made under the authority of the United States." A treaty provision that purports to restrict speech protected by the First Amendment, for example, is not law within the United States because the treaty makers do not have the authority to override the First Amendment. Similarly, a treaty provision that purports to appropriate funds is not law in the absence of implementing legislation because the power to appropriate funds is granted exclusively to Congress. However, apart from those few cases where a treaty provision exceeds the scope of the treaty makers' domestic lawmaking powers, all duly ratified treaties have the status of domestic law, even in the absence of implementing legislation, because the supremacy clause says so.[7]

The second issue that lurks behind the self-execution label is individual rights. Whether a treaty creates individual rights is a question of international law. To answer that question, courts should employ generally accepted methods of treaty interpretation. If a treaty provision is executory, as in *Foster v. Neilson*,[8] it does not create individual rights until the treaty is executed. Similarly, a treaty provision does not create individual rights if it creates only horizontal duties between states (as opposed to vertical duties that states owe to individuals),[9] or if it is so vague that courts cannot ascertain the scope of a state's duty under the treaty.[10]

In contrast, a treaty provision creates individual rights under international law if it is immediately effective and it imposes a specific, vertical duty that a state owes to an identifiable class of individuals. Thus, for example, article 36 of the Vienna Convention on Consular Relations creates individual rights under international law because it creates a specific, nonexecutory duty that states owe to a particular class of individuals.[11]

The third issue that the self-execution label obscures has to do with domestic judicial remedies. U.S. courts often maintain that individuals who are harmed by treaty violations cannot obtain domestic judicial remedies unless the treaty itself creates a private cause of action.[12] That

[5] *See* Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal*: Win at Any Price?*, 74 AJIL 892, 895–96 (1980) (the question of whether a treaty's domestic effects are "to be achieved by legislation or by the treaty itself is a question of constitutional law and not within the purview of the intent either of all parties to the treaty or of a particular ratifying power").

[6] U.S. CONST. ART. VI, cl. 2.

[7] See Sloss, *supra* note 4, at 46–55 (elaborating this point in greater detail).

[8] *Supra* note 3.

[9] *See, e.g.*, Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598 (1884) (distinguishing between treaties that are "primarily a compact between independent nations" and treaties that "confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other").

[10] *See, e.g.*, Sei Fujii v. State, 242 P.2d 617, 619–22 (Cal. 1952) (holding that articles 55 and 56 of the UN Charter are not self-executing because they merely create a general duty to promote human rights without specifying the particular rights to be protected).

[11] *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261, art. 36, para. 1 (providing an individual right for detained foreign nationals to consult with a consular officer and obligating states to inform foreign nationals about this right).

[12] *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring: "Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty [itself] . . . expressly or impliedly provides a private right of action").

approach is misguided. Where an individual invokes a treaty defensively, the question whether the treaty creates a private cause of action is irrelevant.[13] Where an individual invokes a treaty offensively, it should not matter whether the treaty itself creates a private right of action, provided that there is some other source of law—constitutional, statutory, or common—that grants the individual a private right of action.[14] For example, in *American Insurance Assoc. v. Garamendi*[15] the Supreme Court approved a judicial remedy for private plaintiffs who alleged violations of bilateral agreements between the United States and European governments, even though the agreements themselves did not grant them a private cause of action.[16]

The view that individuals cannot obtain domestic judicial remedies unless the treaty itself creates a private cause of action also misconceives the relationship between international rights and domestic remedies. Treaties rarely address explicitly the question of private rights of action because domestic law governs decisions about which remedy to give a particular individual in a given context. Moreover, under generally accepted principles of international law, states parties are obligated to provide a remedy within their domestic legal systems for any person who is harmed by a violation of a treaty provision that confers individual rights on that person, even if the treaty is silent with respect to remedies.[17] Therefore, the fact that a treaty is silent with respect to private rights of action does not mean that the treaty makers intended to preclude domestic judicial remedies. To the contrary, if a treaty creates individual rights but is silent with respect to domestic remedies, domestic courts should ordinarily provide a remedy for individuals harmed by violations of their treaty-protected rights, absent a clear statement of political intent to limit domestic judicial remedies.[18]

Thus, when individuals seek domestic judicial remedies for treaty violations, courts should not ask whether the treaty is self-executing. Instead, they should begin by asking two questions: (1) Is the treaty the law of the land under the supremacy clause? (2) Does the treaty create individual rights under international law for the person seeking relief? (In most cases, courts can safely assume that the answer to the first question is "yes," without explicitly deciding.) If the answer to either question is "no," the individual is not entitled to relief for the alleged treaty violation. However, if the answer to both questions is "yes," the court should address the merits of the claim or defense, subject only to limitations (such as standing, ripeness, or mootness) that would preclude a court from reaching the merits of a claim or defense in which an individual sought a judicial remedy for a statutory violation.

[13] *See, e.g.,* United States v. Duarte-Acero, 132 F.Supp.2d 1036, 1040 n. 8 (S.D. Fla. 2001) ("Courts have uniformly held that there is no private cause of action under the ICCPR. . . . However, because Defendant is raising his ICCPR claims defensively, this limitation does not apply.").

[14] *See* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143–57 (1992) (discussing rights of action that plaintiffs can use to enforce treaty claims).

[15] 123 S. Ct. 2374 (2003).

[16] *See id.* The Supreme Court did not identify the source of the plaintiffs' private right of action in *Garamendi*. The Court apparently assumed, *sub silentio*, that the supremacy clause creates a private right of action for some treaty-based preemption claims against state officers. *See* David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000) (contending that the supremacy clause creates an implied private right of action for certain treaty-based preemption claims).

[17] *See, e.g.,* LaGrand (Germany v. United States of America) (Judgment of June 27, 2001) paras. 79–91, *available at* <http://www.icj-cij.org> (holding that the United States was obligated to give the LaGrand brothers domestic judicial remedies for violation of their rights under article 36 of the Vienna Convention, even though the Convention is silent with respect to domestic remedies).

[18] Non-self-executing declarations clearly express the intent of the political branches to limit domestic judicial remedies for treaty violations, but such declarations should not be construed as a complete bar to domestic judicial remedies. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999) (contending that some judicial applications of human rights treaties are consistent with the treaty makers' intent in adopting non-self-executing declarations). *See also* Sloss, *supra* note 4, at 41–44 (contending that the Constitution mandates judicial remedies for treaty violations in some cases).