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Human Rights - Transnational Abductions - Extraterritorial Application of International Covenant on Civil and Political Rights - Non-Self-Executing Treaties: United States v. Duarte-Acero, 296 F. 3d 1277, cert. denied, 123 S. Ct. 573

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of customary international law to the effect that immunity from civil suit is granted."[35] Although the Court accorded the United States immunity on the ground of an act *jure imperii*, it is open to question whether the distinction made by the Court between acts *jure imperii* and *jure gestionis* mattered at all in this case. As is well known, there is a tendency toward the restriction of immunity in cases relating to death or personal injury in the forum state,[36] regardless of the character of the act in question.[37] This approach can be observed not only in the states, including the United States, that have foreign state immunity statutes, but also in Greece, which does not have such a statute.[38] The writer is of the opinion that in some types of tort proceedings against a foreign state, the exercise of jurisdiction without making a distinction between acts *jure imperii* and *jure gestionis* does not constitute a violation of customary international law.[39] If so, then the exercise of jurisdiction in the *Yokota Base* case might have been permissible under customary international law even if the Supreme Court was correct in applying state immunity under customary international law in this case and in classifying the activity at issue as an act *jure imperii*. The Court should then have examined a variety of questions, including: Could the noise of aircraft be said to cause "personal injury" for purposes of a tort exception?[40] Could jurisdiction be exercised with regard to the claim for an injunction?[41] It is unfortunate that the Court left these issues and others to be considered in the future.

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Human rights—transnational abductions—extraterritorial application of International Covenant on Civil and Political Rights—non-self-executing treaties

UNITED STATES V. DUARTE-ACERO. 296 F.3d 1277, *cert. denied*, 123 S.Ct. 573.
U.S. Court of Appeals for the Eleventh Circuit, July 12, 2002.

In *United States v. Duarte-Acero*,[1] the Eleventh Circuit Court of Appeals held that the International Covenant on Civil and Political Rights does not regulate the extraterritorial conduct of U.S. government agents. Additionally, the court held that the Covenant is not self-executing and therefore that it does not create individual rights that are judicially enforceable in U.S. courts.

[35] Supreme Court judgment, *supra* note 5, at 731.

[36] *See, e.g.*, CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 44 (1988).

[37] *See, e.g.*, Letelier v. Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980) (immunity denied despite the apparently sovereign character of the act at issue).

[38] *See, e.g.*, Prefecture of Voiotia v. Federal Republic of Germany, Case No. 11/2000 (Hellenic Sup. Ct. May 4, 2000) (discussed in case report by Maria Gavouneli & Ilias Bantekas at 95 AJIL 198, 199 (2001)); *but see* FOX, *supra* note 17, at 412 (questioning the approach of the Hellenic Supreme Court since "the injury was sustained in time of war by the armed forces of an occupying government").

[39] *See* Mizushima Tomonori, *Fuhōkōi Soshō ni Okeru Kokusaihō jō no Gaikoku Kokka Menjo [Foreign State Immunity Under International Law in Tort Proceedings]* (pts. 1 & 2), HŌGAKU RONSŌ [KYOTO L. REV.], Sept. 2002, at 120, & Dec. 2002, at 113.

[40] In a Canadian case raising a similar question, the Supreme Court of Canada affirmed the interpretation by the Court of Appeal for Ontario that "personal injury" in section 6(a) of the Canadian State Immunity Act, R.S.C., ch. S-18 (1985), *reprinted in* 21 ILM 798 (1982), required physical injury. Schreiber v. Canada (Attorney General), 216 D.L.R. 513 (Sup. Ct. 2002), *aff'g* 196 D.L.R. 281 (Ontario C.A. 2001). With an amendment made by the Federal Law–Civil Law Harmonization Act, No. 1, Act of May 10, 2001, S.C. 2001, ch. 4, §121(1), *available at* <http://www.parl.gc.ca/PDF/37/1/parlbus/chambus/house/bills/government/S-4_4.pdf>, the relevant part of section 6(a) now reads "personal or bodily injury."

[41] Section 13(2) of the UK State Immunity Act, 1978, c. 33, *reprinted in* 17 ILM 1123 (1978), provides that relief shall not be given against a state by way of injunction. *See also* FOX, *supra* note 17, at 508.

[1] United States v. Duarte-Acero, 296 F.3d 1277 (11th Cir.), *cert. denied*, 123 S.Ct. 573 (2002) [hereinafter Duarte II]. For *Duarte I*, see *infra* note 11 and accompanying text.

In February 1982, Jose Duarte-Acero and his three co-conspirators kidnapped two Drug Enforcement Administration (DEA) agents from their hotel room in Cartagena, Colombia.[2] The four men shot and injured the DEA agents, but the agents survived.[3] Duarte, a Colombian citizen, was convicted by a Colombian court of kidnapping and attempted murder. He served time in a Colombian prison until he was released in December 1984.[4] Meanwhile, in June 1982, a U.S. indictment was issued against Duarte for conspiring to kill the two DEA agents, in violation of 18 U.S.C. §1117 (which prohibits conspiracy to commit murder). The U.S. request to extradite Duarte was denied, however, by the Corte Suprema de Justical, Colombia's highest court.[5] Thus, in the eyes of the Colombian legal system, Duarte was a free man after his 1984 release from prison.

In August 1997, two undercover DEA agents, posing as the proprietors of a Colombian business, asked Duarte to be the manager of a new branch office. Duarte flew to Bogota to meet with them.[6] Having lured Duarte to Bogota under false pretenses, the undercover DEA agents then told him that they needed his help in transporting some computers from Ecuador to Colombia. Duarte crossed the border into Ecuador for the purpose of retrieving the computers. Upon his entry into Ecuador, Ecuadorian police arrested Duarte, informed him "that he was being excluded from Ecuador and turned him over to [DEA] agents."[7] Duarte asked several times to speak with the Colombian Consulate, but his requests were ignored.[8] Instead, his captors placed him on a DEA airplane and flew him to Fort Lauderdale, Florida, to stand trial on the federal criminal charges on which he had been indicted.

In his first motion to dismiss the indictment, Duarte argued that prosecution in the United States for the crimes committed in Colombia would violate the double jeopardy provision—Article 14(7)—of the International Covenant on Civil and Political Rights[9] (ICCPR) because he had already been convicted and sentenced for the same crimes in Colombia. The district court denied Duarte's motion to dismiss the indictment,[10] and the Eleventh Circuit affirmed (in *Duarte I*).[11] The Eleventh Circuit reasoned that the ICCPR's double jeopardy provision bars successive prosecutions by the same state but not by two different states.[12] In support of this conclusion, the court cited a decision of the Human Rights Committee (HRC),[13] which the court described as "a major source for interpretation of the ICCPR."[14]

Duarte then filed a second motion in district court to dismiss the indictment,[15] invoking Article 36 of the Vienna Convention on Consular Relations.[16] He also claimed that the United

[2] Duarte II, *supra* note 1, at 1278–79.

[3] *See* United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984).

[4] Duarte II, *supra* note 1, at 1279.

[5] *Id.*

[6] *Id.*

[7] United States v. Duarte-Acero, 132 F.Supp.2d 1036, 1037 (S.D. Fla. 2001) [hereinafter Duarte II (district court)]. The court's statement that Duarte was being "excluded" from Ecuador presumably meant that Ecuador treated him something like an "excludable alien" under U.S. immigration law. Prior to 1996, that term referred to an alien ineligible for admission into the United States. The current statute refers to "inadmissible" aliens. *See* Rosales-Garcia v. Holland, 322 F.3d 386, 391 n.1 (6th Cir. 2003).

[8] Duarte II (district court), *supra* note 7, at 1037.

[9] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171 [hereinafter ICCPR]. Article 14(7) provides: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

[10] United States v. Benitez, 28 F.Supp.2d 1361 (S.D. Fla. 1998) [hereinafter Duarte I (district court)].

[11] United States v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000) [hereinafter Duarte I].

[12] *Id.* at 1286–87.

[13] The Human Rights Committee, an expert body created by the ICCPR, is responsible for monitoring its implementation. *See* ICCPR, *supra* note 9, Arts. 28–45.

[14] Duarte I, *supra* note 11, at 1287–88 (quoting Maria v. McElroy, 68 F.Supp.2d 206, 232 (E.D.N.Y. 1999)).

[15] Duarte II (district court), *supra* note 7.

[16] Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36, 596 UNTS 261 ("Communication and Contact with Nationals of the Sending State").

States had violated ICCPR Articles 9, 12(4), 13, and 14(1) by forcibly abducting him to the United States. The district court rejected Duarte's Vienna Convention defense on the ground that "dismissal of an indictment is not an appropriate remedy" for violations of Article 36 of the Vienna Convention.[17] The court rejected Duarte's ICCPR defenses on the ground that U.S. agents do not have a duty to comply with the ICCPR when they act "outside the United States and within the boundaries of another country."[18]

Duarte was tried, convicted, and sentenced to life imprisonment. After his conviction, Duarte appealed the district court ruling on the ICCPR defenses raised in his second motion to dismiss.[19] On two alternative grounds, the Eleventh Circuit affirmed (in *Duarte II*)[20] the district court's rejection of those defenses. First, the circuit court held that Ecuador, not the United States, was the party responsible for violating the ICCPR. In support of this position, the court cited ICCPR Article 2(1), which provides: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory* and subject to its jurisdiction the rights recognized in the present Covenant . . . ."[21] In the court's view,

> the plain language of the ICCPR indicates that its provisions govern the relationship between a State and the individuals within the State's territory. . . . All of the violations alleged by Duarte occurred in Ecuador, not the United States. The United States is not obligated to provide relief for alleged violations of the ICCPR committed by other nations.[22]

Alternatively, the court held that the ICCPR is not self-executing and is therefore not binding on federal courts. In support of this proposition, the court cited the non-self-executing declaration ("NSE declaration") adopted by the United States and included in its instrument of ratification. That declaration explicitly provides that "Articles 1 through 27 of the [ICCPR] are not self-executing."[23] As the Eleventh Circuit explained,

> the ICCPR does not create judicially-enforceable individual rights. Treaties affect United States law only if they are self-executing or otherwise given effect by congressional legislation. Articles 1 through 27 of the ICCPR are not self-executing. Nor has Congress passed implementing legislation. Therefore, the ICCPR is not binding on federal courts.[24]

* * * *

The Eleventh Circuit decision in *Duarte II* is the latest in a series of cases in which U.S. courts have ruled in favor of the government after U.S. government agents kidnapped individuals from foreign countries and brought them to the United States to stand trial on federal criminal charges.[25] Nevertheless, *Duarte II*'s factual similarity to other transnational forcible-abduction cases obscures its legal significance as the first such case in which a criminal defendant in the United States has raised the ICCPR as a defense.

On at least two occasions, the HRC has considered whether transnational forcible abduction violates the ICCPR. In one case, Uruguayan government agents, aided by Argentine paramilitary

[17] Duarte II (district court), *supra* note 7, at 1038.

[18] *Id.* at 1040.

[19] The appeal also raised federal statutory issues, Duarte II, *supra* note 1, at 1283–84, and presented a defense based on the Vienna Convention on Consular Relations, *id.* at 1281–82. This comment focuses on his ICCPR defenses.

[20] *See supra* note 1.

[21] ICCPR, *supra* note 9, Art. 2(1) (emphasis added).

[22] Duarte II, *supra* note 1, at 1283.

[23] 138 Cong. Rec. S4783–84 (daily ed. Apr. 2, 1992); *see also* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DEC. 2001, at 192, UN Doc. ST/LEG/SER.E/20 (2002) (reprinting text of U.S. instrument of ratification deposited with the United Nations) [hereinafter Multilateral Treaties].

[24] Duarte II, *supra* note 1, at 1283 (citations omitted).

[25] *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that forcible abduction of Mexican doctor from Mexico to United States did not violate U.S. extradition treaty with Mexico); United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995) (affirming conviction of Honduran national who was tried in federal court on federal criminal charges after being abducted from his home in Honduras by U.S. government agents).

groups, kidnapped a Uruguayan national who was living in Argentina and forcibly abducted him to Uruguay.[26] In another case, Uruguayan agents, working with Brazilian police officials, kidnapped a Uruguayan citizen from her apartment in Brazil and forcibly abducted her to Uruguay.[27] In both cases the HRC held that Uruguay was responsible for ICCPR violations committed by its agents outside of Uruguayan territory,[28] and in both cases the HRC also specifically rejected the interpretation of Article 2(1) adopted by the Eleventh Circuit in *Duarte II*. The HRC said: "[I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[29]

The HRC's interpretation of the ICCPR is not binding on U.S. courts. In *Duarte I*, however, the Eleventh Circuit explicitly stated that the HRC's "decisions in individual cases are recognized as a major source for interpretation of the ICCPR."[30] In light of this statement in *Duarte I*, the Eleventh Circuit in *Duarte II* should, at a minimum, have explained why it adopted an interpretation of ICCPR Article 2(1) that directly contradicted the HRC's interpretation of the same article in factually similar circumstances. Regrettably, though, the court in *Duarte II* did not even mention the views of the HRC.

The views of the HRC are supported by the language of Article 2(1) of the ICCPR, which states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognized in the present Covenant . . . ."[31] There are at least three possible ways to interpret the phrase "and subject to its jurisdiction" in Article 2(1).[32]

One possible interpretation is that the phrase has the same meaning as the immediately preceding phrase—"within its territory"—in which case the phrase "and subject to its jurisdiction" would be entirely redundant. That is the interpretation adopted by the Eleventh Circuit in *Duarte II*, but it is an interpretation that must be rejected since legal documents should not be construed in a manner that renders certain words superfluous. The ICCPR's drafters presumably intended to modify the phrase "within its territory" in some fashion by adding the words "and subject to its jurisdiction."

A second possibility is that the phrase "and subject to its jurisdiction" was intended to limit the scope of the ICCPR so that the rights recognized therein extend only to a subset of individuals within a state's territory—that is, to those individuals within its territory who are also subject to its jurisdiction. One consequence of such an interpretation might be, for example, that foreign ambassadors would not receive the benefit of ICCPR rights because they are not "subject to the jurisdiction" of the state in whose territory they are located. Thomas Buergenthal, now sitting on the International Court of Justice, has observed, "[T]hat reading of Article 2(1)

[26] Lopez Burgos v. Uruguay, Communication No. R.12/52 (June 6, 1979), UN Doc. Supp. No. 40 (A/36/40), at 176 (1981). The cases of the Human Rights Committee are available online at <http://www1.umn.edu/humanrts/undocs/undocs.htm>.

[27] Celiberti v. Uruguay, Communication No. R.13/56 (July 17, 1979), UN Doc. Supp. No. 40 (A/36/40), at 185 (1981).

[28] *See Lopez Burgos*, para. 13 (holding that Uruguay violated "article 9(1) because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention"); *Celiberti*, para. 11 (same). ICCPR Article 9(1) provides, in part: "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

[29] *Celiberti*, para. 10.3; *see Lopez Burgos*, para. 12.3.

[30] Duarte I, *supra* note 11, at 1288 (quoting Maria v. McElroy, 68 F.Supp.2d 206, 232 (E.D.N.Y. 1999)).

[31] ICCPR, *supra* note 9, Art. 2(1) (emphasis added).

[32] The Vienna Convention on the Law of Treaties stipulates that treaty provisions are to be construed "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1), 1155 UNTS 331. Although the United States is not a party to the Convention, the U.S. Department of State has often acknowledged that many of the Convention's provisions reflect customary international law. Moreover, several courts of appeals have cited the Convention as an authoritative source for rules of treaty interpretation. *See generally* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988).

is specious and would produce results that were clearly not intended."[33] Indeed, as Buergenthal noted, under that interpretation Article 12(4) of the ICCPR—which protects the right of an individual to enter his own country—would be utterly meaningless because Article 2(1) would deny protection to the only people whom Article 12(4) could conceivably protect: those who are outside their own country.[34]

The third possible interpretation is that the phrase "and subject to its jurisdiction" was intended to expand the scope of ICCPR rights so that they extend to two groups of individuals: those who are within a state's territory, and those who are outside the state's territory but nevertheless subject to its jurisdiction. This is the only interpretation that is consistent with both Article 2(1)'s plain meaning and the ICCPR's object and purpose.[35] It is unclear under this interpretation whether the ICCPR applies to the actions of the DEA agents who seized Duarte in Ecuador because it is unclear whether Duarte was "subject to the jurisdiction" of the United States, within the meaning of Article 2(1), from the moment they seized him.[36] In any event, the Eleventh Circuit's analysis in *Duarte II* was flawed because the court's interpretation of Article 2(1) ignored the phrase "subject to its jurisdiction" and focused exclusively on the phrase "within its territory."

The Eleventh Circuit's alternative holding—that the ICCPR is not binding on U.S. courts because it is not self-executing—is also subject to criticism. Again, it is instructive to compare *Duarte II* with *Duarte I*. In *Duarte I*, the Eleventh Circuit explicitly stated that upon U.S. ratification the ICCPR "became, coexistent with the United States Constitution and federal statutes, the supreme law of the land."[37] In other words, even though the United States declared the ICCPR to be non-self-executing, the ICCPR is still the law of the land under the Supremacy Clause[38]—which is the conclusion that has been reached by every U.S. court that has specifically addressed the issue.[39] Moreover, the Senate record associated with ratification of the ICCPR makes clear that the NSE declaration was not intended to deprive the ICCPR of its constitutional status as supreme law of the land.[40] Therefore, although the court in *Duarte II* did not explicitly address the ICCPR's status under the Supremacy Clause, it is fair to assume that the Eleventh Circuit's non-self-execution holding in *Duarte II* was not intended to repudiate that court's statement in *Duarte I* that the ICCPR is "the supreme law of the land."[41]

[33] Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981).

[34] *Id.*

[35] *Accord, id.* at 73–77.

[36] Buergenthal suggested that the phrase "subject to its jurisdiction" in Article 2(1) means that a state is liable for the extraterritorial acts of its agents who exercise "actual authority and responsibility." *Id.* at 76–77. Under this interpretation, the United States would be liable for the actions of the DEA agents who seized Duarte if they exercised "actual authority" over Duarte in Ecuador.

[37] Duarte I, *supra* note 11, at 1284.

[38] *See* U.S. CONST. Art. VI, cl. 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

[39] *See* Maria v. McElroy, 68 F. Supp.2d 206, 231–32 (E.D.N.Y. 1999) ("Although the ICCPR is not self-executing, it is an international obligation of the United States and constitutes a law of the land."); Duarte I (district court), *supra* note 10, at 1363 (stating that ICCPR "is the supreme law of the land"); State v. Carpenter, 69 S.W.3d 568, 578 (Tenn. 2001) (stating that ICCPR "is the supreme law of the land").

[40] *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129, 152–71 (1999) (providing detailed analysis of Senate record associated with ratification of human rights treaties) [hereinafter, Sloss, *Domestication*].

[41] A contrary interpretation—that the NSE declaration deprives the ICCPR of its constitutional status as supreme law of the land—would raise potential constitutional difficulties. In a recent article, I provided a detailed defense of the thesis that the treaty makers (that is, the president and the Senate together, acting pursuant to the Article II treaty power) do not have the constitutional power to deprive a treaty of its status as supreme federal law by expressing their intent to do so. *See* David Sloss, *Non-self-executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002). In brief, the argument can be summarized as follows. Nineteenth-century Supreme Court decisions related to the doctrine of non-self-executing treaties support two propositions. First, there are constitutional limits on the treaty makers' power to create domestic law by means of treaties. *See* Whitney v. Robertson, 124 U.S. 190

In 1992, when recommending to the Senate that the United States include an NSE declaration in its instrument of ratification for the ICCPR, the Bush administration explained that the "intent is to clarify that the Covenant will not create a private cause of action in U.S. courts."[42] Accordingly, the district court in *Duarte II* correctly noted that "[c]ourts have uniformly held that there is no private cause of action under the ICCPR."[43] The court added, however, that "because Defendant is raising his ICCPR claims defensively, this limitation does not apply."[44] Thus, according to the district court in *Duarte II*, the NSE declaration had no relevance to Duarte's ICCPR defense. That declaration prevents plaintiffs from invoking the ICCPR in order to establish a private cause of action, but not in order to establish a defense to a criminal prosecution.[45]

In contrast to the district court, the Eleventh Circuit in *Duarte II* apparently believed that the NSE declaration barred both offensive and defensive applications of the ICCPR. The Eleventh Circuit did not, however, offer any explanation or justification for this interpretation. The court merely said that "the ICCPR does not create judicially-enforceable individual rights."[46] There are three possible interpretations of this statement: (1) the ICCPR does not create individual rights under international law; (2) the ICCPR does not create individual rights under domestic law, even though it creates individual rights under international law; and (3) the ICCPR is not judicially enforceable, even though it creates individual rights under both domestic and international law.[47]

If, on the first interpretation, the Eleventh Circuit meant to say that the ICCPR does not create individual rights under international law, then its non-self-execution holding is based on a mistaken understanding of the law. There are, to be sure, many examples of treaty provisions that do not create individual rights under international law.[48] The specific ICCPR provisions at issue in *Duarte II*, however, unquestionably aim to protect individuals and do create individual rights under international law. For example, Duarte relied on ICCPR Article 9(1), which provides: "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." It is evident from the plain meaning of this language that the drafters intended to confer rights on individuals under international law.

What, then, about the second possibility—that the ICCPR does not create individual rights as a matter of domestic law, even though it creates individual rights under international law? If that is what the Eleventh Circuit meant to say, then its non-self-execution holding is founded

(1888). Second, there are some treaty provisions that are not judicially enforceable even though they have the status of supreme federal law under the Supremacy Clause. *See, e.g.*, Edye v. Robertson, 112 U.S. 580 (1884) ("Head Money Cases"); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829). The authors of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965) invoked these nineteenth-century decisions in support of what was, in fact, a very different theory of non-self-execution: the theory that a treaty has the status of supreme federal law if and only if the treaty makers intended it to have that status (see §141). My article defends the original doctrine associated with those nineteenth-century Supreme Court decisions, but I argue that the *Restatement* doctrine should be abandoned: it is at odds with the text and structure of the Constitution, has no basis in Supreme Court precedent, and subverts both rule of law and separation of powers values without advancing any legitimate policy goal.

[42] SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: REPORT, S. EXEC. REP. NO. 102-23, at 19 (1992).

[43] Duarte II (district court), *supra* note 7, at 1040 n.8.

[44] *Id.*

[45] *See* Sloss, *Domestication*, *supra* note 40 (providing detailed defense of thesis that NSE declarations attached to human rights treaties preclude reliance on treaties to establish private cause of action, but do not preclude defensive application of treaties).

[46] Duarte II, *supra* note 1, at 1283.

[47] All three versions assume that the ICCPR is the law of the land under the Supremacy Clause.

[48] *See, e.g.*, Sei Fujii v. State, 242 P.2d 617, 619–22 (Cal. 1952) (holding that Articles 55 and 56 of UN Charter, which obligate member states to "take joint and separate action" to promote human rights, are not judicially enforceable since they do not create individual rights).

upon a dubious, unstated constitutional assumption. Article II of the Constitution gives the treaty makers—the president and Senate—the power to make international treaties.[49] The Supremacy Clause accords such treaties the domestic status of supreme federal law. The treaty makers do, of course, have the power to adopt reservations that limit or modify the scope of the United States' international obligations under a treaty.[50] The NSE declarations attached to human rights treaties were not intended, however, to limit or modify the United States' international obligations.[51] In addition, when the treaty makers adopt a valid reservation, the treaty has the same meaning both domestically and internationally. In contrast, the NSE declaration—under this interpretation of the Eleventh Circuit's non-self-execution holding—modifies the domestic meaning of the treaty without altering its international meaning. Thus, under this interpretation, the Eleventh Circuit's non-self-execution holding necessarily presupposes that Article II grants the treaty makers an *affirmative* constitutional power to create domestic law that is different from the international law created by the treaty.[52] The Eleventh Circuit in *Duarte II* provides no justification for the claim that the treaty makers have such a constitutional power.

The remaining option is the third—that the Eleventh Circuit's non-self-execution holding may be interpreted to mean that the ICCPR is not judicially enforceable as a matter of domestic law, even though it creates individual rights as the law of the land under the Supremacy Clause.[53] On such an interpretation, the Eleventh Circuit's non-self-execution holding raises still other constitutional difficulties. Granted, the political branches have virtually unlimited control over the jurisdiction of the lower federal courts. But there is no question that the district court and the Eleventh Circuit both had jurisdiction over Duarte's case. Therefore, under this interpretation of the Eleventh Circuit decision, the NSE declaration is tantamount to a direct order from the treaty makers to the courts, telling the courts not to apply supreme federal law in a case where they have jurisdiction, even if an individual defendant's federal rights have been violated.[54] There is no authority for the proposition that the political branches have the constitutional power to order a federal court that has jurisdiction over a case to refrain from applying supreme federal law when a criminal defendant alleges a violation

[49] U.S. CONST. Art. II, §2, cl. 2.

[50] *See* Vienna Convention on the Law of Treaties, *supra* note 32, Art. 19. The United States adopted several reservations when it ratified the ICCPR. *See* Multilateral Treaties, *supra* note 23, at 192. None of the U.S. reservations, however, are relevant to Duarte's ICCPR defense.

[51] *See, e.g.*, SENATE COMM. ON FOREIGN RELATIONS, REPORT ON INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, S. EXEC. REP. NO. 103-29, at 26 (1994) ("Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law.").

[52] The treaty makers' power to create individual rights under domestic law is subject to constitutional limitations. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §115(3) (1987). If the treaty makers undertake an international obligation that conflicts with the Constitution, then there would be a discrepancy between the "international treaty" and the "domestic treaty." In that case, the discrepancy between the domestic and international scope of the treaty arises from a *constitutional limitation* on the treaty power. By contrast, in claiming that the treaty makers have the power to make a treaty that has different meanings domestically and internationally, one presupposes that Article II confers on the treaty makers an *affirmative power* to create domestic law that is different from the international law created by the treaty. That interpretation of Article II requires, at a minimum, justification or explanation. *See* JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW 28–30 (2001) (contending that treaty makers lack constitutional power to make a treaty with a domestic meaning that differs from its international meaning).

[53] The Eleventh Circuit's statement that "the ICCPR is not binding on federal courts," Duarte II, *supra* note 1, at 1283, is consistent with this interpretation of its non-self-execution holding.

[54] This version of the Eleventh Circuit's non-self-execution holding is similar to a variant of the political question doctrine endorsed occasionally by the executive branch, which David Bederman has described as follows: "[A]ny case implicating a treaty right is, upon the election of the executive branch, capable of being characterized as a political question and thus rendered nonjusticiable." David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1483 (1999) (describing the argument advanced by the United States in an amicus brief submitted to the Fourth Circuit in *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998)).

of his federally protected rights.[55] Indeed, any system that grants the political branches such power over the judiciary is fundamentally incompatible with constitutional safeguards for an independent judiciary.

In sum, the Eleventh Circuit's non-self-execution holding in *Duarte II* raises more questions than it answers. The Eleventh Circuit should have followed the district court in *Duarte II*, which correctly observed that the NSE declaration was irrelevant to Duarte's ICCPR defense because that declaration merely prevents plaintiffs from invoking the ICCPR to establish a private cause of action.

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[55] Of course, the Eleventh Circuit never reached the question whether Duarte's ICCPR rights were violated. Indeed, what is most disturbing about the court's opinion is that the court apparently believed that the question whether those rights were violated was of no consequence.