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Treaty Law: A Primer for Human Rights Lawyers

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[Perry S. Bechky[1]]

While Americans frequently think of "human rights" as a problem in other countries, qualitatively different from domestic "civil liberties" or "civil rights" issues, human rights treaties may emerge as important protectors of rights here in the United States. It is true, of course, that U.S. law generally meets or exceeds international human rights standards, but where U.S. law falls short, entering treaties can eliminate these deficiencies. For example, the United States remains one of only a handful of countries which executes juvenile offenders – a practice approved by the Supreme Court, but rejected by the international community. [2]

Domestic "civil liberties" lawyers are familiar with three primary sources of legal protection for individual rights: constitutions (federal and state), statutes, and the common law. Increasingly, American lawyers should also look to human rights treaties as a means of defending their clients' rights. Yet, those who hope to invoke human rights treaties in court must understand that treaties are a form of law limited both by their particular texts and their constitutional status. So, while the International Covenant on Civil and Political Rights (ICCPR) adds to our First Amendment liberties an express right to receive information, it also permits exceptions where "necessary for the protection of national security, or of public order, or of public health or morals"[3] and, for reasons discussed below, U.S. courts cannot enforce it.

Making Treaties

Article H of the Constitution authorizes the President to "make" (or "enter") treaties, with the "advice and consent" of two-thirds of the Senate. The Senate may refuse to consent to any treaty and may even decline to consider a treaty altogether; many human rights treaties have waited for years without a Senate vote. The Senate may also attach conditions to its consent.

In practice, the President negotiates treaties without formal Senate advice and then submits the finished text to the Senate for its consent, sometimes signing them before obtaining consent.[4] In the latter case, international law prohibits the United States from defeating the "object and purpose" of the treaty during the (often long) interim,[5] but it is unclear what this obligation entails [6] and it seems unlikely that a court would enforce such a treaty. Presidents often make international agreements without Senate consent, either on their own constitutional authority or with the approval of simple majorities in both Houses.[7] No binding human rights treaty has ever been made, however, by "executive agreement."[8]

If the Senate does consent, the President may decide whether to make the treaty. Typically the treaties negotiated by the President are the ones ultimately made, and a second look provides an additional check on treaty-making. The President may change his mind, may decline to make a treaty to which the Senate has attached unacceptable conditions, or may decline to enter a treaty negotiated by his predecessors.[9]

Executing Treaties

Even after the President has made a treaty, it does not acquire any legal significance, either domestic or international, until it enters into force. Typically this occurs after a fixed period of time, such as 90 days after it has been made. Multilateral treaties usually require a certain number of countries to adhere before they enter into force. This process can take years, during which time the treaty cannot be invoked in court despite U.S. adherence.y[10] Due to the long delays preceding U.S. entry of human rights treaties, this has not posed a problem.

Once a treaty is in force for the United States, according to Chief Justice John Marshall, it is "to be regarded in courts of justice as equivalent to an act of

the legislature, whenever it operates of itself without the aid of any legislative provision." Nevertheless, "if the parties engage[] to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."y[11] U.S. law thus distinguishes between self-executing and non-self-executing treaties. A non-self-executing treaty creates only international legal obligations until Congress implements it, in which case the implementing legislation serves as the actual basis for the domestic obligation.

The Senate may require as a condition of its consent that a treaty be regarded as non-self-executingy[12] and it has made an unfortunate habit of doing so for human rights treaties.y[13] If the Senate is silent, courts in the appropriate cases will determine whether a treaty is self-executing.y[14] A court may also find that certain provisions of a treaty self-execute, while others do not.y[15] Human rights treaties, like the related anti-discrimination provisions in traditional friendship treaties,y[16] are ordinarily regarded as self-executing because they limit government authority without requiring Congress to take any positive action to implement them.y[17] The more vague human rights provisions in the United Nations Charter, however, were found to lack the judicially manageable standards necessary to self-execute.y[18]

Because the United States has an international obligation to implement the non-self-executing treaties, Congress should pass implementing legislation promptly so that courts do not infer from delays that the treaty self-executes. This possibility arises when a court considers the alternative: the treaty is non-self executing and the United States is in default on its international obligations.

Supremacy of Treaties

By their nature, all treaties create international obligations between the signatory states. American courts recognize that some self-executing treaties also create privately enforceable rights,y[19] such as a civil cause of action and a civil or criminal defense. Cases "arising under" a self-executing treaty may be brought in federal court, and may be removed there from state court.y[20] Thus, despite their international nature, treaty-based claims may be justiciabley[21] although some courts shy away from them as political questions.

Pursuant to Article VI, self-executing treaties are the supreme law of the land and as such, they share status equal to that of federal legislation, with the "later in time" prevailing in a conflict.y[22] A new treaty can therefore advance human rights by overriding earlier legislation, and although Congress may subsequently nullify the treaty's domestic application by passing inconsistent legislation, courts seek to interpret statutes to avoid such conflicts.

John Marshall said that, "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."y[23] In keeping with this, Congress clearly has the constitutional power to supersede a treaty as domestic law, but rarely does so as it would put the United States in breach of its international obligations.[24] When implementing non-self-executing treaties, Congress should avoid discrepancies between the implementing legislation and the treaty itself, since the legislation, as the later in time, would invalidate the very treaty it intends to implement to the extent of the conflict.

Treaties preempt inconsistent state law.[25] Just as "incorporation" through the Fourteenth Amendment greatly enhanced the practical value of the Bill of Rights, this aspect of the supremacy clause ensures that the States are held to the same high standards as the federal government. In 1957, the Supreme Court ended earlier doubts, and held that treaties are subordinate to the Constitution.[26] Therefore, treaties are subject to the same constitutional attacks as statutes,y[27] under the same requirements for standing [28] but the Supreme Court has never pronounced any treaty unconstitutional. Nevertheless, this is an issue to which human rights lawyers must be sensitive, not simply for the general purpose of remaing vigilant regarding all potential threats to liberty, but specifically because treaties can implicate our liberties as much as any other governmental action.[29] Even a treaty which generally promotes human rights may adopt a less protective standard, or draw lines between competing rights differently, than the Constitution mandates. For example, the ICCPR requires unconstitutionally overbroad restrictions on

hate speech and the American Convention could be interpreted to prohibit abortions.[30]

Reservations

Some treaties permit signatory states to except themselves from certain obligations under the treaty. The exceptions are known as "reservations,"[31] which are codicils to a state's acceptance of a treaty that effectively modify the treaty's provisions as applied to that state,[32] including its application as domestic law of the United States.[33] As with treaties themselves, the President, not the Senate, makes reservations. The Senate's power lies in its ability to require the President to make certain reservations as a condition of its consent to the treaty.[34]

Reservations allow a state to enter a treaty to which it has certain strong objections which might otherwise prevent its adherence. AS is evident in the U.S. reservation protecting free speech from limitations provided in the ICCPR, reservations can promote human rights.[35] If the United States were to adhere to the American Convention, it could reconcile its constitutional and international obligations either by pronouncing its understanding that the Convention permits abortions, or by rejecting that provision by reservation. Typically, governments make reservations to avoid certain applications of human rights norms, as when the United States reserved the right to execute juveniles and Britain reserved the right to discriminate against women in the royal succession.

Given the theory that allowing reservations encourages greater acceptance of treaties, international law prohibits reservations which defeat the "object and purpose" of the treaty.[36] Sadly, the United States has sometimes pushed the limits of this rule when making human rights treaties. In an act which essentially vitiates its entire obligation under the ICCPR, for instance, the United States stated its understanding that U.S. constitutional standards fully satisfy the treaty's requirements, even when the texts make palpably clear that they do not.[37] The United States also forswore its obligation to ensure that the State governments comply with the treaty.y[38] International law permits other signatories to object to these overbroad reservations, but it is doubtful that a U.S. court would entertain any challenge to them.[39] Instead, concerned Americans should seek their remedies through the democratic process by lobbying the President and Senate both to withdraw existing reservations and to refrain from entering similar ones in the future.

Interpreting Treaties

Interpreting a treaty is fundamentally the same as interpreting any other document, but its international character demands a certain sensitivity.[40] In particular, American courts should ensure that their approach is consistent with the international law of treaty interpretation, as codified in the Vienna Convention on the Law of Treaties.[41] Article 31 provides, "A treaty shall be interpreted in good faith 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."[42] A human rights treaty, then, should be construed to give maximum effect to its basic "object and purpose" of promoting rights.

Many American judges use legislative history in construing statutes, and although Article 32 tolerates less resort to the preparatory works of a treaty, judges often apply their personal approach to legislative history of treaties.[43] In striving to find the internationally accepted meaning of a treaty, American courts will look to "the opinions of our sister signatories," including their courts, international tribunals, and United Nations bodies responsible for its implementation; none of these external views are binding, but they are "entitled to considerable weight."[44] When a treaty is authenticated in more than one language, as most multilateral treaties are, each text is equally authoritative,[45] and U.S. courts will consider foreign texts in construing the English version.[46] American courts must also consider the "understanding" of the Senate at the time of consent (but not later)[47] and the views of the Executive,[48] even if these lead to a construction different than a foreign or international court would reach.

Terminating Treaties

Some treaties expire by their terms, while others remain in force until terminated by the Presi-

dent. Congress can supersede a treaty as domestic law, but cannot terminate it. There is controversy as to whether the President needs Senate or Congressional consent to terminate a treaty.[49] Courts will not void a treaty even if it is voidable under international law, leaving that responsibility to the political branches.y[50] The United States has never terminated a human rights treaty, but rights advocates must bear this possibility in mind, especially if a treaty figures prominently in a controversial judicial decision. Many treaties require signatories to give notice several months before the termination becomes effective, during which time lobbying could induce the President to withdraw the U.S. notice.[51]

Customary International Law

Independent of its treaty obligations, the United States is also bound by "customary international law,"y[52] which "results from a general and consistent practice of states followed by them from a sense of legal obligation."[53] As part of "the law of nations," customary norms are incorporated into U.S. law and both the federal and state governments may be held accountable for their violation. Courts, however, will not provide a remedy for breaches resulting from a "controlling executive... act," which one court interpreted to mean any breach authorized by the President or Attorney General.[54] Since customary law exists independently of treaties, it is particularly relevant where the United States fails to enter a treaty, makes substantive reservations, declares it non-self-executing, or terminates it.

The Universal Declaration on Human Rights and the major human rights treaties are evidence of customary human rights norms,[55] though it should be emphasized that it is the substantive provisions, not the treaties themselves, which constitute customary law. Expressly leaving open the possibility of other norms emerging later, the American Law Institute identified seven activities currently prohibited by customary human rights law: genocide, slavery and the slave trade, murder and disappearances, torture, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of human rights.[56]

With the United States beginning to embrace the basic instruments of international human rights law, "civil liberties" lawyers should familiarize themselves with the principles of treaty law so that they may effectively invoke these new sources to preserve the rights of their clients, and of all Americans.

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[2] *Compare* Stanford v. Kentucky, *429 U.S. 361 (1989)* with *ICCPR, art. 6(5).* See also id. *at 389-90 (Brennan, J., dissenting).*

[3] *ICCPR, art. 19.*

[4] *The United States has signed but not entered the American Convention on Human Rights and United Nations treaties concerning racial discrimination, gender discrimination, and economic, social and cultural rights.*

[5] *Vienna Convention on the Law of Treaties, art. 18, 23 May 1969,* reprinted in *8 I.L.M. 679 (1969).*

[6] See RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES *§ 312, comment i, reporters' note 6.*

[7] See, e.g., United States v. Belmont, *301 U.S. 324 (1937).*

[8] *By contrast, the President entered the non-binding Helsinki Final Act without Senate consent–and, though formally non-binding, the agreement may have some legal significance.* Oscar Schachter, The Twilight Existence of Nonbinding International Agreements, *71 A.J.I.L. 269 (1977).*

[9] *For example, President Taft declined to make arbitration treaties with Britain and France due to unacceptable Senate conditions and, although the Senate consented to the Vienna Convention on Diplomatic Relations early in the Johnson Administration, the United States did not adhere to it until 1972, under President Nixon.* RESTATEMENT (THIRD) *§ 303, reporters' note 3; § 312, reporters' note 4.*

[10] RESTATEMENT (THIRD) *§ 312, comment j.*

[11] Foster v. Neilson, *2 Pet. 253, 314 (U.S. 1829).*

[12] RESTATEMENT (THIRD) *§ 111(4).* Cf. United States v. American Sugar Co., *202 U.S. 563 (1906).*

[13] See, e.g., *S.Exec.Rep.No.2., 99th Cong., 2d Sess. 26 (1985) (declaring the Genocide Convention a non-self-executing treaty),* reprinted in *80 A.J.I.L. 612, 621 (1986).*

[14] See, e.g., United States v. Percheman, *32 U.S. (7 Pet.) 51 (1833);* Trans World Airlines, Inc. v. Franklin Mint Corp., *466 U.S. 243, 252, 276 (1984).*

[15] RESTATEMENT (THIRD) *§ 111, comment h.*

[16] See, e.g., Ware v. Hylton, *3 U.S. (3 Dall.) 199 (1796);* Asakura v. Seattle, *265 U.S. 332, 341 (1924).*

[17] Commonwealth v. Hawes, *76 Ky. (13 Bush) 697, 702-03 (1878),* quoted in RESTATEMENT (THIRD) *§ 111, reporters' note 5.*

[18] Sei Fujii v. State, *242 P.2d 617 (CA 1952).*

[19] Head Money Cases, *112 U.S. 580, 598-99 (1884).*

[20] U.S. CONST. art. III.; 28 U.S.C. §§ 1331, 1441; cf. Chisholm v. Georgia, 2 Dall. 419, 474 (U.S. 1793) (Opinion of Jay, C.J.).

[21] Baker v. Carr, 369 U.S. 186, 211-12 (1962).

[22] The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-621 (1870); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Cook v. United States, 288 U.S. 102 (1933).

[23] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[24] RESTATEMENT (THIRD) § 115.

[25] Asakura v. Seattle, 265 U.S. 332, 341 (1924).

[26] Compare Reid v. Covert, 354 U.S. 1, 16-19 (1957) with Missouri v. Holland, 252 U.S. 416, 433 (1920).

[27] There is one-now largely insignificant-exception to this rule: the federal government may enter any treaty, and implement it by statute, even if the subject matter would otherwise fall outside the enumerated powers of Congress. Missouri v. Holland, 252 U.S. 416 (1920).

[28] RESTATEMENT (THIRD) § 302, reporters' note 5.

[29] See, e.g., Weinberger v. Rossi, 456 U.S. 25 (1982) (construing a treaty exception to an anti-discrimination statute).

[30] ICCPR, art. 20; American Convention, art. 4.

[31] Vienna Convention, art. 2. The international legal definition of "reservations" is also broad enough to include what the United States terms "understandings" and "declarations."

[32] Vienna Convention, art. 21.

[33] RESTATEMENT (THIRD) § 314, comment b.

[34] See Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869).

[35] The U.S. reservations to the ICCPR are reprinted at 1 ACLU INTERNATIONAL CIVIL LIBERTIES REPORT xi (December 1992).

[36] Vienna Convention, art. 19; Advisory Opinion on Reservations to the Genocide Convention, [1951] I.C.J. 15.

[37] Compare the text of the Eighth Amendment with the significantly broader ICCPR Article 7.

[38] See ICCPR, art. 50; Vienna Convention, art. 29; cf. Chisholm v. Georgia, 2 Dall. 419, 474 (U.S. 1793) (Opinion of Jay, C.J.).

[39] International tribunals, by contrast, may decide such claims, but they rarely have jurisdiction to hear claims brought by individuals. The Interhandel Case (Switz. v. U.S.), [1959] I.C.J. 6; Advisory Opinion on Restrictions to the Death Penalty, Inter-American Court of Human Rights para. 61 (1983), reprinted in 23 I.L.M. 320 (1984).

[40] For recent guidance on treaty interpretation by the Supreme Court, see Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S.Ct. 2104, 2108 (1988).

[41] The Executive and some courts have recognized the principles reflected in the Vienna Convention as binding law. S.Exec.Doc.L., 92d Cong., 1st Sess. 1 (1971), reprinted in HENKIN, ET AL., INTERNATIONAL LAW 387 (2nd ed. 1987); Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1361-62 (2d Cir. 1992), rev'd on other grounds sub nom., Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549 (1993).

[42] Cf. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S.Ct. 2104, 2108; id. at 2114 (Brennan, J., concurring).

[43] Compare Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) (Scalia, J.) with id. at 137-47 (Brennan, J., concurring).

[44] See, e.g., 30 Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.); Eastern Airlines, Inc. v. Floyd, 111 S.Ct. 1489, 1501-02 (1991); INS v. Cardoza-Fonseca, 480 U.S. 421, 439 (1987).

[45] Vienna Convention, art. 33.

[46] United States v. Percheman, 32 U.S. (7 Pet.) 51, 88-89 (1833) (Marshall, C.J.); Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549, 2563-64 (1993).

[47] See Fourteen Diamond Rings v. United States, 183 U.S. 176, 180 (1901).

[48] Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[49] See Goldwater v. Carter, 444 U.S. 996 (1979).

[50] Charlton v. Kelly, 229 U.S. 447 (1913).

[51] Vienna Convention, art. 68 (based on state practice regarding President Johnson's withdrawal of U.S. notice of its intent to terminate the Warsaw Convention).

[52] The Paquete Habana, 175 U.S. 677 (1900).

[53] RESTATEMENT (THIRD) § 102(2).

[54] Compare The Paquete Habana, 175 U.S. 677, 700 (1900) with Garcia-Mir v. Meese, 788 F.2d 1146 (11th Cir. 1986), cert. denied, 107 S.Ct. 289 (1986).

[55] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[56] RESTATEMENT (THIRD) § 702, comment a.