

Continuing Relevance of International Law in U.S. Legal System

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This memo outlines the continuing relevance of international law in the United States' legal system.

I. Enforceability of Ratified Treaties in U.S. Courts

Traditionally, international treaties bear a presumption of judicial enforceability in the United States. The Supremacy Clause establishes treaties as judicially enforceable and supreme over state law.² While the Supreme Court in *Foster v. Neilson* acknowledged the possibility that some treaties would not be judicially enforceable, the Court also recognized the presumption that treaties will generally be judicially enforceable as domestic law where they address private rights.³

This well-established presumption of judicial enforceability goes back to the founding era.⁴ In the 1796 case *Ware v. Hylton*, Justice Iredell distinguished between “executed” and “executory” treaty provisions: executed provisions were those that “require[d] no further act to be done,” while executory provisions required the government to take some action.⁵ Justice Iredell went on to explain that “[b]efore adoption of the U.S. Constitution, all such provisions would have taken effect as domestic law *only if* Congress on the American side, or Parliament on the British side, had written them into domestic law.”⁶ However, after the adoption of the Constitution, such further legislative action was no longer required in the U.S. for a treaty provision dealing with debt collection.⁷ In fact, the driving force behind including treaties in the Supremacy Clause of the U.S. Constitution was the fact that under the Articles of Confederation and Continental Congress, “[t]he states’ defiance of America’s treaty obligations . . . convinced even

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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 in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

³ 27 U.S. (2 Pet.) 253, 314 (1829).

⁴ See, e.g., *Medellin v. Texas*, 128 S.Ct. 1346, 1392-93 (2008) (Breyer, J., dissenting) (offering an Appendix of 29 Supreme Court decisions that considered treaty provisions to be self-executing); *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (invalidating a city ordinance that denied the issue of pawnbroker licenses to non-citizens because it violated a treaty between Japan and the U.S.); *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 388 (1840) (“[I]t would seem to be settled by the Constitution; for if a treaty made under its authority, is a supreme law of the land, it would be a bold proposition [to assert] that an act of Congress must be first passed in order to give it effect as such.”); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (invalidating a Virginia state statute that conflicted with a treaty providing for recovery of Revolutionary War debts).

⁵ *Ware*, 3 U.S. (3 Dall.) at 272-73.

⁶ *Medellin*, 128 S.Ct. at 1378 (Breyer, J., dissenting) (discussing *Ware*, 3 U.S. (3 Dall.) at 274-77).

⁷ *Ware*, 3 U.S. (3 Dall.) at 276-77.

the most ardent advocates of states' rights at the [Constitutional] Convention that treaties should be the supreme law of the land."⁸

The presumption of enforceability remains unchanged by the Supreme Court's decision in *Medellin v. Texas*. The Court in *Medellin* found insufficient evidence that the 1945 United Nations Charter, the Statute of the International Court of Justice ("ICJ"), and the 1963 Vienna Convention on Consular Relations and its Optional Protocol were intended to render ICJ judgments directly enforceable in the U.S. However, the majority was careful to indicate that this ruling did not prevent other treaties from being judicially enforceable, including those treaties subjecting the U.S. to the decisions of international bodies: "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so."⁹

And, while some treaties may not be self-executing in U.S. courts, all ratified treaties remain the "supreme law of the land" and, under international law, impose an international legal obligation, not just a moral obligation on the United States.¹⁰ Moreover, the Executive still has a constitutional duty to "take Care that the Laws be faithfully executed,"¹¹ and Congress has authority to pass legislation necessary and proper to fulfill treaty obligations.¹² Further, under several ratified treaties, Congress has an obligation to enact legislation that implements these treaty obligations.¹³

II. Customary International Law in U.S. Courts

Customary international law has long been recognized as a form of domestic law in the U.S. and applied by the Supreme Court:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.¹⁴

⁸ JERALD A. COMBS, *THE JAY TREATY* 27-28 (1970). See also WALTER STAHR, *JOHN JAY* 145-222, 271-338 (2005) (examining the history surrounding the American peace treaty with Britain, including the challenges of ratification in the Continental Congress); *THE FEDERALIST* NO. 64 (John Jay) (defending the treaty power under the Constitution); cf. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 29, 389 (Max Farrand ed., rev. ed. 1966) (describing offered supremacy clauses); 3 *id.* at 273, 286 (debating Supremacy Clause). This history is aptly captured in Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 *COLUM. L. REV.* 833, 844 & n.65 (2007).

⁹ *Medellin*, 128 S.Ct. at 1364-65.

¹⁰ Under the Vienna Convention, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

¹¹ U.S. CONST. art. II, sec.3.

¹² *Missouri v. Holland*, 252 U.S. 416 (1920).

¹³ International Covenant on Civil and Political Rights, art. 2(2), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

¹⁴ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

As Justice Souter expressed in *Sosa v. Alvarez-Machain*: “For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”¹⁵ *Sosa* reaffirmed the application of customary international law through the Alien Tort Statute.¹⁶

Customary international law plays a useful gap-filling function in several other important areas of law,¹⁷ including in cases considering piracy,¹⁸ citizenship,¹⁹ admiralty,²⁰ counterfeiting,²¹ and treatment of ambassadors.²²

III. Resort to International Law in Interpreting Domestic Statutes and Constitutional Provisions

The Supreme Court has long held that the laws of the United States should be construed to be consistent with customary international law whenever possible. In 1804, the *Charming Betsy* case explained that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²³ This canon of construction has since been applied in numerous Supreme Court cases.²⁴ In the absence of a clear expression of contrary intent, courts will assume that Congress did not intend to supersede customary international law.²⁵

Finally, since the beginning of our nation, the Supreme Court has resorted to international law in constitutional interpretation in cases involving individual rights, as well as in other contexts.²⁶

¹⁵ 542 U.S. 692, 729-30 (2004). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances.”); *The Nereide*, 13 U.S. (9 Cranch) 388 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is a part of the law of the land.”).

¹⁶ 28 U.S.C. § 1350; *Sosa*, 542 U.S. at 716-25 (reviewing the history of the Alien Tort Statute and the Judiciary Act of 1789 and concluding that “the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations”). For example, the court in *Filartiga v. Pena-Irala* found that torture was prohibited by the law of nations, and it provided relief to family members of a torture victim under the Alien Tort Statute on those grounds. 630 F.2d 876, 883-84 (2d Cir. 1980).

¹⁷ See generally Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006).

¹⁸ See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

¹⁹ See, e.g., *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 248 (1830).

²⁰ See, e.g., *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793).

²¹ See, e.g., *United States v. Arjona*, 120 U.S. 479 (1887).

²² See, e.g., *In re Baiz*, 135 U.S. 403, 419 (1890); *Hunter’s Lessee*, 14 U.S. (1 Wheat.) at 335; *Chisholm*, 2 U.S. (2 Dall.) at 475.

²³ *Murry v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.).

²⁴ See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 (1993); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

²⁵ “Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded . . . customary international-law . . .” *Hartford Fire Ins.*, 509 U.S. at 815 (Scalia, J., dissenting).

²⁶ See Cleveland, *supra* note 17. Note that while this memo primarily examines resort to international law—not citation of comparative practices of foreign states—U.S. courts also have a long history of resorting to comparative foreign law as persuasive, not binding, authority. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); Vicki C. Jackson, *Constitutional Law and Transnational Comparisons*, 30 HARV. J.L. & PUB. POL’Y 191 (2006). For the purposes of this memo, it is

Resort to international law was particularly common at the founding of the nation, and the practice continues to be followed in a variety of areas.²⁷

important maintain the distinction between international law and comparative law, as the former is binding in the U.S. under the circumstances discussed in this memo, while comparative law is not.

²⁷ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 520, 538 (2004) (recognizing that international law limits the scope of the President's detention power and invoking the Geneva and Hague Conventions); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women in support of proposition that affirmative action programs are encouraged but "must have a logical end point"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (Marshall, C.J.) (resorting to international law to interpret Congress's power to regulate commerce); *id.* at 227 (Johnson, J., concurring) ("[T]he definition and limits of [the power to regulate commerce] are to be sought among the features of international law.").

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