

# ***Alvarez-Machain II: The Supreme Court's Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights***

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## I. BACKGROUND

Humberto Alvarez-Machain, a Mexican national, was kidnaped in Mexico and brought to the United States at the behest of U.S. Drug Enforcement Administration (DEA) agents for allegedly assisting in the torture and murder of a DEA agent in Mexico.<sup>1</sup> He challenged the jurisdiction of U.S. courts to try him, arguing that his illegal seizure barred the trial.<sup>2</sup> The Supreme Court rejected that contention, holding that “the power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’”<sup>3</sup> This writer was one of the few who supported the Supreme Court’s decision sustaining jurisdiction, arguing that it was consistent both with international law and with the Fourth Amendment.<sup>4</sup>

On remand, the district court found that the evidence presented by the government was insufficient to establish guilt beyond a reasonable doubt, and dismissed the charges against him.<sup>5</sup> Alvarez-Machain then brought a civil action for damages against the United States, based on the Federal Tort Claims Act (FTCA),<sup>6</sup> and an action against Sosa, one of his abductors, and

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1. United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992).

2. *Id.* at 658.

3. *Id.* at 661 (quoting *Frisbie v. Collins*, 342 U.S. 519, 552 (1952)).

4. See Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT’L L. 736 (1992).

5. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2746 (2004).

6. 28 U.S.C. §1346(b)(1) (2000) (“the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred”). The FTCA further provides, “The provisions of this chapter and section 1346(b) of this title shall not apply to . . . [a]ny claim arising in a foreign country.” 28 U.S.C. §2680(k) (2000).

other Mexican nationals, based on the Alien Tort Statute (ATS).<sup>7</sup> The district court dismissed the FTCA claim but granted summary judgment and damages on the ATS claim. The United States Court of Appeals for the Ninth Circuit, in a unanimous three-judge decision<sup>8</sup> and a six-to-five en banc decision,<sup>9</sup> affirmed the ATS judgment but reversed the dismissal of the FTCA claim. The Supreme Court granted certiorari.<sup>10</sup>

The Court held that the action under the FTCA was barred by the statute's exclusion of "[a]ny claim arising in a foreign country."<sup>11</sup> Although the Court interpreted the ATS as providing not only a basis of jurisdiction, but also a cause of action for a "narrow class of international norms today,"<sup>12</sup> it concluded that Alvarez-Machain's claim that he was illegally arrested and detained for less than one day in Mexico did not implicate any of those norms.<sup>13</sup>

7. 28 U.S.C. §1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Some commentators and the lower courts, including the court of appeals in this case, have referred to it as the Alien Tort Claims Act. *See Alvarez-Machain v. United States*, 331 F.3d 604, 608 (9th Cir. 2003). The Supreme Court referred to it as the Alien Tort Statute, and this article follows that usage.

8. *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001).

9. *United States v. Alvarez-Machain*, 331 F.3d 604 (9th Cir. 2003).

10. *United States v. Alvarez-Machain*, 124 S. Ct. 821 (2003).

11. *Sosa v. Alvarez-Machain* [*Alvarez-Machain II*], 124 S. Ct. 2739, 2748 (2004) (quoting the text of the FTCA); *see supra* note 6.

12. *Alvarez-Machain II*, 124 S. Ct. at 2764. To satisfy the Court's test, the international rule in question must be one that is as well established and as clearly defined today as the international law rules pertaining to piracy, ambassadors, and safe conduct were at the time of the adoption of the ATS. The Court said,

We think it is correct, then, to assume 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, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. . . . [W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.

*Id.* at 2761-2762; *see also* Breyer, J., concurring in part and concurring in the judgment: "[T]o qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy." *Id.* at 2782.

13. *Id.* at 2766-2769. Although the Court had acknowledged in the first *Alvarez-Machain* decision that "[r]espondent and his amici may be correct that respondent's abduction was 'shocking,' and that it may be in violation of general international law principles," 504 U.S. at 669 (internal citations omitted), in *Alvarez-Machain II* the Court determined that the plaintiff's forcible transfer from Mexico to the United States was not before it ("As he presently

The Court's interpretation of the FTCA and of the ATS was supported by an analysis of the history and purpose of these statutes, and it established important new law on the scope of the FTCA and of the ATS, respectively. Its decision and the extensive reasoning in support of its interpretation of each of these statutes will no doubt be the subject of numerous articles. This article focuses, instead, on a single sentence in the Court's opinion – the sentence referring to the non-self-executing declaration in the Senate resolution giving advice and consent to U.S. ratification of the International Covenant on Civil and Political Rights (ICCPR)<sup>14</sup> – which is not supported by any reasoning or citation of authority, but which, in this commentator's opinion, is of at least equal importance, and perhaps of even greater importance, than the Court's interpretation of the statutes involved.

In his claim under the ATS, Alvarez-Machain relied on provisions of the Universal Declaration of Human Rights<sup>15</sup> and the ICCPR<sup>16</sup> to establish that his

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argues it, the claim does not rest on the cross-border feature of his abduction.”), 124 S. Ct. at 2767, that the arrest in the United States was authorized by a warrant, and that, therefore, the only claim before it was that Alvarez-Machain's arrest and detention for one day in Mexico constituted a violation of the law of nations. It was that claim that the Court rejected. The Court said, “It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.” *Id.* at 2769. The court of appeals had noted that one of the questions before it was “whether the forcible, transborder abduction of a Mexican national . . . gives rise to a civil claim under United States law,” 331 F.3d at 608, but it concluded that the plaintiff lacked “standing to obtain redress for claims based on an alleged violation of Mexico's sovereignty and that his claim for transborder abduction fails.” *Id.* at 614.

14. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. See *infra* text accompanying note 21. The Senate gave its advice and consent to ratification on April 2, 1992. The United States deposited the instrument of ratification on June 8, 1992, and the Covenant entered into force for the United States on September 8, 1992. See David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUMAN RIGHTS L.J. 77, 77 & n.1 (1993). The Senate resolution included the following: “the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.” 138 CONG. REC. S4783 (1992), reprinted in Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 111 (1995).

15. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (1948). Article 9 of the Universal Declaration provides, “No one shall be subjected to arbitrary arrest, detention or exile.”

16. ICCPR, *supra* note 14. The Covenant 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 procedure as are established by law.” Art. 9(1). It further provides, “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” *Id.*, art. 9(5).

illegal arrest and detention in Mexico<sup>17</sup> was a violation of the “law of nations.”<sup>18</sup> The Court rejected both contentions. With respect to the Universal Declaration, the Court said, “the Declaration does not of its own force impose obligations as a matter of international law,” quoting the famous statement by Eleanor Roosevelt that the Declaration is “a statement of principles . . . setting up a common standard of achievement for all peoples and all nations . . . not a treaty or international agreement . . . impos[ing] legal obligations.”<sup>19</sup>

With respect to the International Covenant on Civil and Political Rights, a treaty ratified by the United States,<sup>20</sup> the Court said, “although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing *and so did not itself create obligations enforceable in the federal courts.*”<sup>21</sup> This conclusion is problematic in two respects: (1) a non-self-executing declaration in the Senate resolution giving advice and consent to a treaty that *by its terms* is self-executing is arguably inconsistent with the provision in Article VI of the U.S. Constitution that “all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land,” and (2) even if the non-self-executing declaration is valid, it does not bar consideration of the ICCPR as evidence that a well-defined rule of customary international law exists.

It should also be noted that although the Court used the term “understanding,” the non-self-executing provision was included as a “declaration” in the Senate’s resolution, not as an understanding.<sup>22</sup> Senate resolutions giving advice and consent to U.S. ratification of a treaty have qualified that consent in three different ways: with a reservation, with an

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17. The Court understood his claim for damages to be based solely on his detention in Mexico. *See supra* note 13.

18. *See supra* note 7.

19. *Alvarez-Machain II*, 124 S. Ct. at 2767; *see* General Assembly Adopts Declaration of Human Rights: Statement by Mrs. Franklin D. Roosevelt, 19 Dep’t St. Bull. 751 (1948). While the Universal Declaration did not impose legally binding obligations when it was adopted, some commentators take the position that the Declaration, or at least some provisions of it, have become customary international law. *See, e.g.*, Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 394 (1985) (“According to Professor Humphrey, who was one of the Declaration’s drafters, . . . ‘the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states.’”).

20. *See supra* note 14.

21. *Alvarez-Machain II*, 124 S. Ct. at 2767 (emphasis added).

22. *See supra* note 14.

understanding, or with a declaration.<sup>23</sup> A reservation is a statement that a particular provision of the treaty will not apply to the United States. An understanding is the U.S. interpretation of that treaty, or of a provision thereof. Both reservations and understandings are included by the President in the instrument of ratification and may or may not be accepted by other states parties to the treaty.<sup>24</sup> A declaration is generally intended to have domestic effect only. Had the Senate used an understanding, rather than a declaration, it would not raise the same Article VI problems, since it would be stating that the United States is *interpreting the treaty* as requiring further legislative action, rather than declaring that a treaty (or treaty provision) which by its terms would have been judicially enforceable, is not enforceable.<sup>25</sup>

## II. THE CONSTITUTIONALITY OF NON-SELF-EXECUTING DECLARATIONS

### A. *International Law*

International law leaves it to each state to determine how it will

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23. The Senate Resolution giving advice and consent to the ICCPR included five reservations, five understandings, and four declarations. See S. EXEC. REP. NO. 102-23 (1992), at 21-23, *reprinted in* 31 I.L.M. 645, 658-659. In addition, the resolution included the following: "The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President: Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." S. EXEC. REP. NO. 102-23 at 24, 31 I.L.M. at 660. The Senate resolution on the Genocide Convention required the President to refrain from ratifying that convention until Congress adopted implementing legislation. See *infra* note 92 and accompanying text.

24. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 20, 1155 U.N.T.S. 331 [hereinafter VIENNA CONVENTION]. "Reservation" means a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." *Id.* at art. 2(1)(d); see also David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 172 nn.228, 229 (1999). The United States has not ratified the Vienna Convention on the Law of Treaties but accepts it as customary law. See CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 856-857 (5th ed. 2001).

25. If the language of the treaty is clearly self-executing, an understanding that it is not self-executing would, of course, not be appropriate. Vásquez suggests use of a reservation, rather than a declaration that the treaty is non-self-executing. See *infra* text accompanying notes 74-78. That, however, raises other constitutional problems. See *infra* text accompanying notes 95-97.

implement its treaty obligations.<sup>26</sup> The laws of some states provide that treaties ratified by the state automatically become the law of that state.<sup>27</sup> The laws of other states provide that treaties have no domestic effect without implementing legislation.<sup>28</sup> Still others have hybrid systems, in which some treaties or parts of treaties are self-executing, while some require implementing legislation.<sup>29</sup> International law, however, does require states to act in good faith.<sup>30</sup> That means, *inter alia*, that if a state ratifies a treaty, it is required to implement it;<sup>31</sup> a state should not ratify a treaty that it does not

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26. See Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 317, 320 (1992) ("Whether a treaty is or is not self-executing is a domestic law question in that domestic law determines whether the treaty creates rights that domestic courts are empowered to enforce in a State. The courts may and often do answer this question differently in different countries, depending upon their national constitutions, legal traditions, historical precedents and political institutions."). However, a treaty may provide or be interpreted as providing that it will be directly enforceable in the courts of the states parties. The treaty establishing the European Economic Community has been so interpreted. See *id.* at 325-335.

27. See *id.* at 315.

28. See *id.* at 359-360; Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 213 (1997) ("British and Australian constitutional practice and to a lesser extent in some Scandinavian countries, is governed by the proposition that a treaty becomes domestic law only when the national parliament has conferred that status on it by special legislation"); R. Higgins, *United Kingdom*, in THE EFFECT OF TREATIES IN DOMESTIC LAW 123, 125 (Francis G. Jacobs & Shelley Roberts eds., 1987) ("A treaty has no effect in English law unless it is made part of domestic law."). Professor Higgins quotes Lord Denning's famous dictum, "We take no notice of treaties until they are embodied in laws enacted in Parliament." *Id.* at 133. However, she notes, "while this states the formal position, the reality is not so simple." *Id.* at 125. According to Higgins, unincorporated treaties cannot be looked at by the courts as a basis of a cause of action, but there are many examples of cases in which unincorporated treaties have been construed by English courts and considered "as a legally relevant rule of decision." *Id.* at 134-135. Buergenthal similarly states that "while unincorporated treaties are not a formal source of law in the United Kingdom . . . they play an increasingly important role in the interpretation and application of domestic law." Buergenthal, *supra* note 26, at 360 (footnotes omitted).

29. The United States is an example. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(3) & cmt. h (1987) ("Some provisions of an international agreement may be self-executing and others non-self-executing.") [hereinafter RESTATEMENT].

30. See VIENNA CONVENTION, *supra* note 24, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); see also *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 268 (Dec. 20) ("One of the basic principles governing the creation and performance of legal obligations . . . is the principle of good faith.").

31. With respect to some treaties where the Senate resolution included or the Executive recommended that it include a non-self-executing declaration, the United States made it clear that it did not intend to adopt implementing legislation. See, e.g., SENATE COMM. ON FOREIGN RELATIONS, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. EXEC. REP. NO. 103-38, at 7-8 (1994). Although the United States has generally

intend to implement.

### *B. The U.S. Constitution*

It has long been accepted as black letter law that in the United States treaties may be self-executing or non-self-executing, and that a declaration by the Senate in its resolution giving advice and consent to ratification that the treaty is non-self-executing makes it unenforceable in U.S. courts.<sup>32</sup> Recently, such declarations have been routinely included by the Senate in its approval of human rights treaties. One prominent commentator cautioned:

The pattern of non-self-executing declarations threatens to subvert the constitutional treaty system. That, for the present at least, the non-self-executing declaration is almost exclusively a concomitant of U.S. adherence to human rights conventions will appear to critics as an additional indication that the United States does not take such conventions seriously as international obligations.<sup>33</sup>

A number of commentators, including this writer,<sup>34</sup> have taken the position that a declaration that a treaty (or treaty provision) that by its terms would be self-executing is not self-executing, is inconsistent with the language, history, and purpose of Article VI of the U.S. Constitution.

Article VI of the U.S. Constitution provides, "This Constitution, and the Laws of the United States . . . 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."<sup>35</sup> This language, making treaties the supreme law of the land, and the provision in Article III giving federal courts jurisdiction in cases involving treaties,<sup>36</sup> were adopted to avoid the problems created by the system that existed under the Articles of

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taken the position that no implementing legislation is necessary because U.S. law already provides the rights in question, that is not always true. Indeed, if all the rights provided by a treaty were already provided by U.S. law and enforceable in U.S. courts, the non-self-executing declaration would be superfluous and there would be no reason to include it.

32. See RESTATEMENT, *supra* note 29, at §111(3), §111(4)(b) & cmt. h.

33. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348 (1995).

34. See Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49 (1997).

35. U.S. CONST. art. VI.

36. Article III, §2 provides: "The judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Confederation, which left the enforcement of treaties to the legislatures of each of the states.<sup>37</sup>

The history of the clause makes clear that the Framers intended treaties to have immediate effect as domestic law<sup>38</sup> and to be interpreted and applied by the courts “like all other laws.”<sup>39</sup> Thus, Hamilton wrote in *The Federalist*, “The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.”<sup>40</sup> Justice Story declared:

It is . . . indispensable, that [treaties] should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. . . . If they are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied . . . .<sup>41</sup>

A treaty that is not self-executing is not the supreme law of the land. For example, if a treaty requires *a*, existing law requires *not-a*, the treaty is not self-executing, and no implementing legislation has been enacted, then a court will be required to apply *not-a*, rather than *a*. Thus, *not-a*, rather than *a*, is the supreme law of the land. Even if implementing legislation is enacted, it is the statute implementing the treaty that is the supreme law of the land, rather than the treaty, as provided for by Article VI.<sup>42</sup>

Although the proposition that in the United States treaties may be either self-executing or non-self-executing is generally attributed to Chief Justice Marshall’s decision in *Foster & Elam v. Neilson*,<sup>43</sup> the terms “self-executing” and “non-self-executing” do not even appear in the opinion. Nor did Marshall

37. See JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 695-696 (1833).

38. For a review of this history, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 761-764 (1988). But see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

39. THE FEDERALIST NO. 22, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

40. *Id.*

41. 3 STORY, *supra* note 37, at 694-695.

42. If the implementing legislation is identical to the treaty, the distinction is purely theoretical and has no practical effect. Professor John Sims, Co-Editor-in-Chief of this Journal, has postulated a situation in which there would be a practical effect. He notes that if there has been a long delay in passing the implementing legislation, and inconsistent treaties or statutes have been adopted in the interim, then the “last in time” rule would yield different results depending on whether the earlier treaty or the later implementing statute is applied.

43. *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).



suggest that the Senate has the constitutional authority to provide by declaration (or reservation) that a treaty ratified by the United States shall not be applied by the courts. On the contrary, he stressed that, unlike the situation in other states, in the United States treaties have the force of law as soon as they are ratified and must be applied by the courts. Chief Justice Marshall said,

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. *In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, 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.*<sup>44</sup>

It is only where the treaty by its terms requires legislative action that it cannot be applied by the courts directly. That, in Marshall's view, was the case in *Foster & Elam v. Neilson*. In that case the plaintiff claimed title to land based on a treaty between the United States and Spain.<sup>45</sup> The treaty provided that all grants of land made by Spain "shall be ratified and confirmed to the persons in possession of the lands."<sup>46</sup> This language, as initially interpreted by Marshall, did not ratify and confirm title to the land of those who held it under Spain; rather, it obligated the United States to enact legislation ratifying and confirming title.<sup>47</sup> Marshall stated:

The article under consideration does not declare that all the grants . . . shall be valid. . . . It does not say that those grants are hereby confirmed. *Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is that those grants shall be*

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44. *Id.* at 314 (emphasis added); *see also* United States v. Rauscher, 119 U.S. 407, 418 (1886) (quoting *Foster & Elam*); Head Money Cases, 112 U.S. 580, 598-599 (1884) ("A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."); United States v. Puentes, 50 F.3d 1567, 1573 (11th Cir. 1995) (citing *Rauscher*).

45. *Foster & Elam*, 27 U.S. (2 Pet.) at 299-300.

46. Treaty of Peace and Friendship, Feb. 22, 1819, U.S.-Spain, art. 8, 8 Stat. 252, 258.

47. *Foster & Elam*, 27 U.S. (2 Pet.) at 314-315.

ratified and confirmed to the persons in possession . . . . By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws of the subject.<sup>48</sup>

Marshall made it clear, however, that absent language of contract, the treaty would be enforceable by the court in the same manner as a statute.<sup>49</sup> Indeed, when it was brought to his attention in a subsequent case that the Spanish version of the treaty, which was equally authentic, provided that the grants by Spain “shall remain ratified and confirmed,” he held the treaty to be self-executing.<sup>50</sup>

Marshall’s position in *Foster & Elam v. Neilson* – that a treaty which by its terms imposes an obligation on the states parties to enact legislation, rather than establishing rights or imposing obligations directly, cannot be enforced by the courts – is entirely consistent with the Supremacy Clause. The treaty is the supreme law, but what the treaty by its terms requires is that the legislature act (something the court cannot enforce). Although it may not always be clear whether a treaty establishes rights and obligations directly or imposes an obligation to enact legislation, as the treaty in *Foster & Elam v. Neilson* demonstrates, some treaties very clearly require states to enact legislation, particularly those involving criminal responsibility,<sup>51</sup> whereas

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48. *Id.* (emphasis added).

49. *Id.* at 314.

50. *United States v. Percheman*, 32 U.S. (2 Pet.) 51, 68-69, 88-89 (1833).

51. For example, the treaties dealing with airplane hijacking and sabotage, hostage taking, attacks on diplomats, and seizure of ships on the high seas all provide that the states parties shall make the prescribed conduct punishable by severe penalties. *See* Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, art. 2 (“Each Contracting State undertakes to make the offence punishable by severe penalties”); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, art. 3 (“Each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties”); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, art. 2 (“The intentional commission of . . . a murder, kidnapping or other attack upon the person or liberty of an internationally protected person . . . shall be made by each State Party a crime under its internal law”); International Convention Against the Taking of Hostages Convention, Dec. 17, 1979, T.I.A.S. 11081, art. 2 (“Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences”); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, 27 I.L.M. 672, art. 5 (“Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences”). *See also* Convention on the Prevention and Punishment

others do not require legislation in order to implement the rights established.<sup>52</sup> In some states, domestic law may require implementing legislation for all treaties.<sup>53</sup> That apparently was the general rule in Marshall's time.<sup>54</sup> But, as Marshall made clear, in the United States "a different principle [was] established."<sup>55</sup> The Constitution declared treaties to be "the law of the land," to be regarded by the courts "as equivalent to an act of the legislature."<sup>56</sup>

Marshall's position – that treaties which by their terms require legislative action cannot be enforced by the courts – was later transformed into a rule that, in the United States, treaties may be self-executing or not, notwithstanding the language of the treaty itself, depending on the intent of the Senate in giving advice and consent and on the intent of the President in ratifying the treaty.<sup>57</sup> However, the proposition that a treaty cannot be enforced by the courts because the President or Senate declares that it is not self-executing, even though the treaty by its terms establishes rights or imposes obligations directly, is inconsistent with the view expressed by Marshall. Further, the proposition clearly contravenes the command of the Constitution that *all* treaties are the supreme law of the land and the judges of every state shall be bound thereby.<sup>58</sup>

It is only where the treaty by its terms requires further government action, that is, where the international obligation is to enact legislation, that a treaty can be said to be the supreme law of the land even though it cannot be

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of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. 5 ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.").

52. See, e.g., International Covenant on Civil and Political Rights, *supra* note 14, art. 12 (2) ("Everyone shall be free to leave any country, including his own."). As Professor Oscar Schachter noted, "many, though not all, of the provisions of the Covenant are capable of direct application by the courts . . . without any legislative action." Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in *THE INTERNATIONAL BILL OF RIGHTS* 311, 326 (Louis Henkin ed., 1981).

53. See *supra* note 28 and accompanying text.

54. See *supra* text accompanying note 44.

55. See *supra* text accompanying note 44.

56. See *supra* text accompanying note 44.

57. See Carlos Manuel Vásquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 704 (1995); Paust, *supra* note 38, at 767 ("Later commentators . . . have distorted [Marshall's] meaning . . .").

58. U.S. CONST. art. VI. While Article VI refers to state judges, it seems highly unlikely that it was the intent of the Framers that state judges would be bound by a treaty while federal judges would not. See Flaherty, *supra* note 38, at 2123 ("the Supremacy Clause . . . expressly stipulated judicial enforcement by the state courts and implicitly did the same with regard to the national judiciary.").

invoked as the basis of a claim or defense. That is so because the treaty does not purport to establish any rights or obligations, but only to obligate the states parties to establish such rights and obligations. Numerous treaties do exactly that. For example, treaties dealing with specific aspects of terrorism provide, “Each Contracting State undertakes to make the offense punishable by severe penalties,” or language to that effect.<sup>59</sup> Similarly, most provisions of the Convention on the Elimination of all forms of Discrimination Against Woman (CEDAW) are by their terms non-self-executing.<sup>60</sup>

Although it is accepted black letter law that in the United States a treaty or treaty provision may be self-executing or non-self-executing,<sup>61</sup> a number of prominent scholars and commentators have challenged or questioned the constitutionality of a Senate declaration that a treaty which is self-executing by its terms, is not self-executing.<sup>62</sup> Professor Jordan Paust states, “The distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that ‘all Treaties . . . shall be the supreme Law of the Land.’”<sup>63</sup> Professors Stefan Riesenfeld and Frederick Abbott write, “The framers of the Constitution intended that treaties be given direct effect in U.S. law when by their terms and context they are

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59. See *supra* note 51; see also International Convention for the Suppression of Terrorist Bombings, *opened for signature* Jan. 12, 1998, 37 I.L.M. 249, art. 4 (“Each State Party shall adopt such measures as may be necessary . . . [t]o make those offences punishable by appropriate penalties which take into account the grave nature of those offences”); International Convention for the Suppression of the Financing of Terrorism, *opened for signature* Jan. 10, 2000, S. TREATY DOC. NO. 106-49, 39 I.L.M. 270, art. 4 (“Each State Party shall adopt such measures as may be necessary . . . [t]o make those offences punishable by appropriate penalties which take into account the grave nature of the offences”).

60. See Halberstam, *supra* note 34, at 70.

61. See *supra* note 29.

62. See Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 516-518 (1991); Paust, *supra* note 38, at 760-761; Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 631 (1991); see also *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong. 89 (1980) (statement of Prof. Oscar Schachter) (“I see no reason why the United States, which has a clear constitutional provision making treaties the law of the land, should deprive the citizens of the United States of the advantage of that constitutional provision.”); Charles H. Dearborn III, Note, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 233-234 (1979) (arguing that “declarations [making a treaty non-self-executing] are of dubious validity”). If the language of a treaty or treaty provision is ambiguous, a statement by the President or the Senate in the form of an understanding or declaration is appropriate and should be considered by the courts in determining whether it was intended to be self-executing or non-self-executing.

63. Paust, *supra* note 38, at 760.

self-executing. An ancillary power of the Senate to deny self-execution directly contradicts this intent.”<sup>64</sup> Professor Lori Damrosch states, “A Senate declaration purporting to negate the legal effect of otherwise self-executing treaty provisions is constitutionally questionable as a derogation from the ordinary application of Article VI of the Constitution.”<sup>65</sup>

Although the Restatement (Third) of the Foreign Relations Law of the United States appears to accept the validity of a non-self-executing declaration by the Senate,<sup>66</sup> Professor Louis Henkin, its Chief Reporter, later wrote that “such a declaration is against the spirit of the Constitution; it may be unconstitutional.”<sup>67</sup> He added in a footnote, “If what I wrote might be interpreted as supporting a general principle that would allow the President, or the Senate, to declare all treaties non-self-executing, that is not my opinion.”<sup>68</sup> Professor (now Judge) Thomas Buerghenthal states “it may seriously be doubted” that “the non-self-executing declaration is constitutional,”<sup>69</sup> and further, that the “U.S. declarations making human rights treaties non-self-executing are ill advised and probably unconstitutional.”<sup>70</sup>

Some commentators, though seeking to limit the effect of non-self-executing declarations, do not consider them a violation of the Supremacy Clause.<sup>71</sup> Thus, Professor Vásquez, after distinguishing among four categories of non-self-executing treaties, states:

It is possible, then, that by attaching the declaration to the treaty, the treaty-makers intended to deny domestic legal force to a treaty that would otherwise be self-executing in every sense of the term. If this were the treaty-makers’ intent, the declarations may be characterized

64. Riesenfeld & Abbott, *supra* note 62, at 599.

65. Damrosch, *supra* note 62, at 527. Damrosch adds, “accordingly [the Senate Declaration] should not be sustained unless there is some constitutionally-based justification for the Senate to inject itself into the question.” *Id.* Damrosch then discusses and refutes various arguments that might be made to justify a non-self-executing declaration. *Id.* at 527-532. She concludes that “[i]t would be far preferable for the Senate to discontinue the device of non-self-executing treaty declarations . . . . [T]he effectiveness of international law would be strengthened by eliminating this unnecessary impediment to judicial enforcement of treaties.” *Id.* at 532.

66. RESTATEMENT, *supra* note 29, §111(4)(b) & cmt. h. For a critique of the RESTATEMENT’s reasoning, see Vásquez, *supra* note 57, at 707-708.

67. Henkin, *supra* note 33, at 346.

68. *Id.* at 347 n.26.

69. Buerghenthal, *supra* note 28, 36 COLUM. J. TRANSNAT’L L. at 221.

70. *Id.* at 222.

71. See Carlos Manuel Vásquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2186-2187 (1999); Vásquez, *supra* note 57; David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999).

as an attempt to countermand for a given treaty the rule that the Supremacy Clause would otherwise establish. . . . I have never taken the position that such declarations are invalid.<sup>72</sup>

He reasons that since under *Foster & Elam* “the treaty-makers could render an otherwise self-executing norm non-self-executing by framing it as a requirement of future legislation,”<sup>73</sup> the same end can be accomplished by a “‘non-self-executing’ reservation attached to a treaty that would otherwise clearly be self-executing.”<sup>74</sup>

There is, of course, a distinction. In *Foster & Elam*, the “treatymakers,” that is, both parties to the treaty, were thought by the Court to have understood that their agreement would not be judicially enforceable. In the case of a reservation, only one of the parties to an agreement that by its terms is judicially enforceable determines that it will not be so enforceable. It is also unclear whether a reservation that only addresses how the United States will implement its treaty obligations is valid under U.S. law. In *Power Authority of New York v. Federal Power Commission*,<sup>75</sup> the United States Court of Appeals for the District of Columbia Circuit held, in a two-to-one decision, that it is not.<sup>76</sup> Moreover, in Vázquez’s view such a reservation would only be valid if “the other parties to the treaty do not object to it” and if “the reservation is not contrary to the object and purpose of the treaty.”<sup>77</sup> Further, he would require a reservation, rather than a declaration, in order to avoid “the interpretive [and] constitutional issues surrounding such declarations.”<sup>78</sup>

Finally, even though Vázquez does not consider all non-self-executing provisions to be unconstitutional, the non-self-executing declaration in the ICCPR (and the other human rights treaties ratified by the United States) would probably not be valid under his criteria, and that would be so even if it had been made as a reservation. The ICCPR requires states to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”<sup>79</sup> To the extent that making the treaty non-self-executing would deny a remedy, such a reservation would be “contrary to the object and purpose of the treaty.” The ICCPR does not require that there be

72. Vázquez, *supra* note 71, 99 COLUM. L. REV. at 2186-2187.

73. *Id.* at 2187.

74. *Id.*

75. 247 F.2d 538 (D.C. Cir.), *vacated and remanded with instructions to dismiss as moot sub nom.* American Pub. Power Ass’n v. Power Auth. of New York, 355 U.S. 64 (1957).

76. *See infra* text accompanying notes 95-97.

77. Vázquez, *supra* note 71, 99 COLUM. L. REV. at 2187-2188.

78. *Id.* at 2187.

79. ICCPR, *supra* note 14, art. 2(3)(a).

a judicial remedy, and there are cases in which non-judicial remedies exist. But, as David Sloss notes, “In the U.S. legal system . . . Article III courts are the most common fora in which individuals seek remedies for violations of their rights. Hence, many cases will undoubtedly arise in which litigants seek judicial remedies for treaty-based rights, and no alternative forum is available.”<sup>80</sup>

Professor John C. Yoo is probably the strongest proponent of non-self-execution.<sup>81</sup> Yoo’s basic thesis is that the Supremacy Clause is a federalism clause, not a separation of powers clause, and that a treaty dealing with matters that are within Congress’s Article I powers is not self-executing; it must be implemented by Congress. Not only does he believe that non-self-executing declarations are constitutional, he argues for a presumption of non-self-execution. He says, “At the very least courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing.”<sup>82</sup>

In a long and meticulously footnoted article Yoo marshals arguments based on history, policy, and text to support his position that the intent of the Framers was to make treaties non-self-executing. For evidence of the “original understanding” he relies on British practice at the time of the framing, pursuant to which the King made treaties but Parliament had to adopt legislation to implement them,<sup>83</sup> and on the state ratification conventions.<sup>84</sup> Yoo’s historical arguments are refuted by Martin Flaherty.<sup>85</sup> While highly complimentary of Yoo’s historical method in some respects, he

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80. Sloss, *supra* note 71, at 210; *see also* Schachter, *supra* note 52, at 329 (“The drafters of the Covenant considered that Article 2(3) should in some way reflect the general view that judicial remedies were especially important. They did so by adding to subparagraph 2(3)(b) a general commitment of states to ‘develop the possibilities of judicial remedy.’”).

81. *See* Yoo, *supra* note 38.

82. *Id.* at 2093.

83. *See id.* at 1997-2004.

84. *See id.* at 2025. He quotes numerous statements by anti-federalists, attacking the Treaty Clause on the ground that it permits the President and the Senate to make law, and the defense of the federalists that the House of Representatives will have an influence in the implementation of treaties, to support his position that treaties were not intended to be self-executing. *Id.* at 2064-2068. To this reader, these statements appear to support the opposite conclusion. The statements that the Treaty Clause permits the President and Senate to legislate are clear and unequivocal. The statements he quotes in apposition never state that treaties will *not* be the law domestically unless or until implemented by Congress, but only that legislation “may be” necessary to implement some treaties and that Congress will have an impact through funding and other requirements. His historical review proves that at the very least a number of prominent Framers, including Alexander Hamilton and Chief Justice Jay, considered treaties self-executing. *See also* statements quoted *infra* note 87.

85. *See* Flaherty, *supra* note 38.

finds flaws with it in others<sup>86</sup> and reaches an opposite conclusion. He interprets some of the documents cited by Yoo differently, cites other documents, and concludes that the intent of Article VI was to establish that treaties would be the supreme law of the land without implementing legislation. In Flaherty's view, "history clearly supports the self-executing orthodoxy," and "an examination of both the context and sources on which Yoo relies indicates that his revisionist conclusions are untenable."<sup>87</sup>

Yoo's textual argument is that while the purpose of the Supremacy Clause was to make treaties supreme over state law, nothing in Article VI indicates that no implementing legislation would be required. There are several responses to this argument. First and foremost, Article VI states that "*all* treaties . . . shall be the supreme Law of the Land," not that "treaties . . . shall be the supreme law *if Congress adopts implementing legislation.*" If the intent had been to condition supremacy on the adoption of implementing legislation by Congress, Article VI would have so provided. Second, Article VI provides that judges in every state "shall be bound" to enforce treaties, again without a requirement that there be implementing legislation. Third, it lists treaties together with the Constitution and statutes, neither of which requires implementing legislation. Fourth, if treaties were meant to become law only when there was implementing legislation, there was no need to include treaties in the Supremacy Clause at all, because once the implementing legislation was adopted, the rights they established would be supreme law as statutes. Yoo's interpretation – that treaties should be given domestic legal effect only if Congress adopts implementing legislation – in effect reads the treaty provision out of the Supremacy Clause, because under it treaties would never be the supreme law, only the statutes implementing them would be.<sup>88</sup>

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86. For example, in discussing Yoo's interpretation of the "Founders' experience," he compliments Yoo's "rigor and erudition," but criticizes Yoo for "conclusions that he fails to support or justify." *Id.* at 2112-2113. A little farther on, he refers to Yoo's "rigorous and nuanced account" of a matter, but two lines later says "even these well-told developments undercut Yoo's central thesis." *Id.* at 2125.

87. *Id.* at 2099. To support the proposition that "the delegates [to the Federal Convention] . . . presupposed that treaties would operate as law of their own force *without implementing legislation,*" Flaherty cites Gouverneur Morris's motion to strike from the enumerated powers of Congress the power to "enforce treaties" on the ground that it was "superfluous since treaties were to be 'laws,'" and James Wilson's (failed) motion that the House join the Senate for treaty making purposes, arguing that "[a]s treaties . . . are to have the operation of laws, they ought to have the sanction of laws also." *Id.* at 2123-2124 (emphasis added).

88. Yoo suggests that the Supremacy Clause acts as a sort of "necessary and proper" clause, providing the authority for Congress to adopt the implementing legislation. Yoo, *supra* note 38, at 1979. However, the Necessary and Proper Clause already does that. It provides that "the Congress shall have power to . . . make all laws which shall be necessary and proper for



Yoo's strongest argument against making treaties the law of the land without implementing legislation is the policy argument that treaties now regulate matters that were traditionally regulated by domestic law, and that if treaties become law automatically, the treaty process could be used to supplant the legislative process. Thus, Yoo argues, "If the United States forges multilateral agreements addressing problems that were once domestic in scope, treaties could replace legislation as a vehicle for domestic regulation. . . . [M]aking treaties self-executing [could] create a potentially limitless executive power."<sup>89</sup> Further, he argues, since under *Missouri v. Holland* the Tenth Amendment is not a limitation on the treaty power, as it is on Congress's Article I powers, when *Missouri v. Holland* is combined with "claims that all treaties have the same legal force as statutes, that they automatically preempt inconsistent state law, and that they are to be immediately enforced by the federal and state courts, the treaty power becomes an unlimited authority to legislate on any subject."<sup>90</sup>

The possibility that the treaty process might supplant the state and federal legislative process should be taken seriously. But it does not require nullification of the Supremacy Clause. There are at least two methods (and no doubt others) that the Senate can use to preserve a role for the House when it wishes to do so. It can, as it did with the Genocide Convention,<sup>91</sup> require that Congress adopt legislation *before* the President ratifies the treaty.<sup>92</sup> That would have the additional benefit that the United States would not be breaking its international obligations if it failed to implement the treaty domestically. The Senate could also advise the President that he should negotiate a treaty that is non-self-executing by its terms.

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carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, §8, cl. 18 (emphasis added). Article II vests power in the President to make treaties provided that two-thirds of the Senators present concur. The Necessary and Proper Clause thus empowers Congress to adopt legislation implementing treaties. See *Missouri v. Holland*, 252 U.S. 416 (1920); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 204 (2d ed. 1996).

89. John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2236-2237 (1999).

90. *Id.* at 2238-2239.

91. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

92. The Senate Resolution provides that "the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted." SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. REP. NO. 99-2, at 26, 27 (1985).

Although the Supreme Court has previously indicated that in the United States a treaty may be self-executing or not,<sup>93</sup> it had never ruled on the enforceability of a treaty provision which by its terms was self-executing, but which the Senate declared to be non-self-executing.<sup>94</sup> In *Power Authority of New York v. Federal Power Commission*,<sup>95</sup> the United States Court of Appeals for the District of Columbia Circuit held that a reservation that would have had the effect of making a treaty provision non-self-executing was invalid.<sup>96</sup> It did so, however, not on the ground that it violated the Supremacy Clause, but on the ground that since the reservation had no effect on the other party to the treaty it was not a valid reservation.<sup>97</sup>

Some commentators have suggested that the non-self-executing declaration is too well “entrenched” to be held unconstitutional.<sup>98</sup> Although the proposition that a treaty that the Senate declares to be non-self-executing cannot be invoked in a U.S. court has long been accepted, the fact that a practice has long been *assumed* to be constitutional does not make it so, as the Supreme Court made clear in *Immigration and Naturalization Service v. Chadha*.<sup>99</sup> In that case, the Court found the use of the legislative veto unconstitutional, even though such provisions had been included in nearly 200 statutes between 1932 and 1975.<sup>100</sup> The Court noted that “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”<sup>101</sup> That non-self-executing declarations have been *assumed* to

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93. See, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (“the Convention is a self-executing treaty. . . . [N]o domestic legislation is required to give the Convention the force of law in the United States.”); *Warren v. United States*, 340 U.S. 523, 531 (1951), Frankfurter, J., dissenting (“[a]ssuming that Article 2 of the convention is self-executing . . .”).

94. See Vásquez, *supra* note 57, at 706-707.

95. 247 F.2d 538 (D.C. Cir.), *vacated and remanded with instructions to dismiss as moot sub nom.* *American Pub. Power Ass’n v. Power Auth. of New York*, 355 U.S. 64 (1957).

96. The case involved a Senate reservation to the Niagara Waters Treaty with Canada, Treaty Relating to Uses of Waters of the Niagara River, Feb. 27, 1950, U.S.-Can., 1 U.S.T. 694, providing that “no project for redevelopment of the United States’ share of such waters shall be undertaken until it be specifically authorized by Act of Congress.” *Id.* at 699. For a discussion of *Power Authority of New York*, see Malvina Halberstam, *A Treaty Is a Treaty Is a Treaty*, 33 VA. J. INT’L L. 51, 56-58 (1992).

97. *Power Authority of New York*, 247 F.2d at 543.

98. Vásquez, *supra* note 71, 99 COLUM. L. REV. at 2188 (“A strict textualist might object that this construction is unfaithful to the Supremacy Clause’s text, which makes ‘all’ treaties the law of the land. But the opposite conclusion, in my view, would require the rejection of too much entrenched doctrine to be plausible.”).

99. 462 U.S. 919 (1983).

100. *Id.* at 944.

101. *Id.*

be constitutional should not preclude the Court from holding that if a treaty (or treaty provision) by its terms establishes rights or imposes obligations that can be enforced by the courts directly, a Senate declaration that would bar the courts from enforcing those rights violates the Constitution.<sup>102</sup>

Surprisingly, despite the considerable body of scholarly writing challenging the constitutionality of non-self-executing declarations, the Court in *Alvarez-Machain II* does not even discuss the question,<sup>103</sup> and neither the concurring opinions nor the dissent<sup>104</sup> addresses it. The majority's reference to the Senate's "understanding," rather than declaration, also indicates that the statement was not given much thought. While the Court was probably not using "understanding" in its technical sense, its failure to distinguish between a declaration and an understanding,<sup>105</sup> both terms of art in the treaty context, leaves the impression that this aspect of the case probably did not receive thorough consideration.

102. Compare RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 271-272 (3d ed. 1995) (suggesting that U.S. courts could ignore such a declaration "since it is not technically part of the treaty"). If the treaty by its terms requires legislation, then the non-self-executing declaration would not be unconstitutional; it would merely be superfluous.

103. Aside from the single sentence set forth earlier, *see* text accompanying note 21, there is only one reference in the majority opinion to the "non-self-executing" declaration. *See Alvarez-Machain II*, 124 S. Ct. 2739, 2763 (2004), where the Court remarked, "Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing." Here the Court stated, correctly, that the Senate "declared that . . ." The Court referred, incorrectly, however, to "its [the Senate's] ratification of the International Covenant on Civil and Political Rights." The Senate did not ratify the Covenant; only the President can ratify treaties. The Senate gives its consent to ratification. U.S. CONST. art. II, §2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . ."). There have been instances in which the Senate gave its consent but the President did not ratify a treaty. *See* Henkin, *supra* note 88, at 179 ("Presidents . . . have refused to ratify treaties to which the Senate consented.").

104. Justice Scalia's failure to discuss the language and original meaning of the Supremacy Clause is particularly surprising, since he generally puts great emphasis on the exact words of the Constitution and the intent of the Framers. *See, e.g., Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring) ("The Fourth Amendment protects '[t]he right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures . . .'. U.S. Const., Amdt. 4 . . . The obvious meaning of the provision is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.") (emphasis in original). He further states, "The founding-era materials that I have examined confirm that this was the understood meaning," *id.* at 92, criticizing the State and its *amici* for their failure to mention "one word about the history and purposes of the Fourth Amendment or the intent of the framers of that Amendment." *Id.* at 92-93.

105. *See supra* note 14 and text accompanying note 22.

### III. TREATIES AS A SOURCE OR EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

The doctrine that a Senate declaration providing that a treaty is non-self-executing renders it unenforceable in U.S. courts is so deeply ingrained that the plaintiff in *Alvarez-Machain II* did not even seek to base his action directly on the International Covenant on Civil and Political Rights. Rather, he relied on the treaty to establish a rule of customary international law. Thus, the Court stated:

the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. *Accordingly, Alvarez cannot say that the [Universal] Declaration [of Human Rights] and Covenant themselves establish the relevant and applicable rule of international law. He instead attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law.*<sup>106</sup>

The Court apparently rejected reliance on the Covenant even for this limited purpose. Whether the treaty is self-executing or requires implementing legislation in the United States, however, should have no bearing on its use as a source of or evidence of customary international law. Customary international law is generally defined as “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>107</sup> A treaty provision may be a codification of existing customary law, or it may establish a new rule of international law applicable to the states parties, which may become a rule of customary law if the treaty is widely ratified.<sup>108</sup> The

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106. *Alvarez-Machain II*, 124 S. Ct. at 2767 (citation omitted; emphasis added).

107. RESTATEMENT, *supra* note 29, §102(2); see Malvina (Halberstam) Guggenheim, Book Review, 8 Tex. Int'l L.J. 289, 289 (1973) (reviewing ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971)) (“Generally, custom is defined as a practice engaged in by a number of states, over a period of time, in the belief that it is required by or consistent with existing international law, and generally acquiesced to by others.”).

108. See Blakesley, *supra* note 24, at 858. For example, the Vienna Convention on the Law of Treaties purports to codify customary law on treaties, *id.* at 856, a position apparently accepted by the United States. *Id.* at 857. The Genocide Convention is, arguably, an example of a treaty that has become customary international law or even *jus cogens*. For a discussion (some fifteen years ago) of whether the Genocide Convention is customary international law, see Panel, *Genocide: The Convention, Domestic Laws, and State Responsibility. Prospects for Implementation of the Genocide Convention Under United States Law*, 83 AM. SOC'Y INT'L L. PROC. 314 (1989). Compare statement by Jordan Paust (“One can celebrate also the achievement of a common expectation that the prohibition of genocide is a preemptory norm of customary international law, a *jus cogens*, allowing no form of derogation under domestic or treaty-based law. Further, it is commonly understood that the definition of genocide

International Covenant on Civil and Political Rights has been ratified by 152 states.<sup>109</sup> The inclusion of a right in a treaty that has been ratified by 152 states, including the United States and all Western democracies, would seem to indicate that it is a well-established right under international law.<sup>110</sup> That is the criterion set forth by the Court for a permissible action under the Alien Tort Statute.<sup>111</sup>

Although the Court noted that Alvarez-Machain relied on the Covenant “to show that prohibition of arbitrary arrest has attained the status of binding customary international law,”<sup>112</sup> it did not appear to consider the Covenant

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contained in the Convention defines that which is prohibited by customary *jus cogens*.”), *id.* at 316, with statement by Benjamin Ferencz (“I cannot share Professor Paust’s conclusion that genocide has become a crime under customary international law and that there is, as in the case of piracy, universal jurisdiction to try the offense.”), *id.* at 326. See also *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (taking the position that Article 2(4) of the U.N. Charter prohibiting the threat or use of force has become customary international law).

109. Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal Human Rights Treaties*, June 9, 2004, available at <http://www.unhchr.ch/pdf/report.pdf>.

110. Whether the facts of this case constitute a violation of that right is an entirely different question and beyond the scope of this article. It is at least arguable that the arrest and brief detention of someone in Mexico for the purpose of delivering him to U.S. agents who have a valid U.S. arrest warrant, which may or may not have authorized arrest outside the United States, is not “arbitrary” within the meaning of article 9 of the Covenant. *But see* *United States v. Alvarez-Machain*, 331 F.3d 604, 622-623 (9th Cir. 2001) (holding that the warrant did not authorize arrest outside the United States and equating “arbitrary” with “not pursuant to law”). In some European countries it is apparently routine for police in neighboring states to cooperate by arresting persons for whom an arrest warrant has been issued in one state, bringing him to the border, and handing him over to the police of the other state. While such an arrest may not be legal, since no valid arrest warrant exists in the state where the arrest is made, it is clearly also not “arbitrary.” Similarly, in the case of two others charged in connection with the murder that gave rise to the *Alvarez-Machain* litigation, one was arrested in Mexico by local Mexican police and handed over to U.S. Marshals at the U.S.-Mexican border, another was arrested in Honduras by Honduran Special Troops and brought to a U.S. Air Force base. *Id.* at 623 n.23. It is at least arguable that an arrest based on probable cause and a valid arrest warrant in a neighboring country was not what article 9 of the Covenant was intended to condemn. Where the arrest is made by persons who are not acting in an official capacity, but acting nevertheless in cooperation with law enforcement officials of a neighboring state who have a valid arrest warrant, as in this case, the argument is weaker, but still plausible. Thus, had the Court not rejected consideration of the ICCPR based on the non-self-executing declaration, it still could have found that the Alien Tort Statute did not provide a remedy in this case. Further, if it had determined that article 9 of the Covenant was intended to forbid arrests made in cooperation with law enforcement officials of neighboring states who had probable cause and valid arrest warrants, these factors and the brevity of the illegal detention make it likely that any damages would have been minimal.

111. See *Alvarez-Machain II*, 124 S. Ct. at 2761-2762; *supra* note 12.

112. See text at note 106 *supra*.

when it determined that the rule against arbitrary arrest has not achieved the level of acceptance as a rule of customary international law necessary to make it enforceable under the ATS. Even if the non-self-executing declaration bars enforcement of the Covenant in U.S. courts, however, it should not bar the Covenant's use as a source of or evidence of the existence of a rule of customary international law.<sup>113</sup> The point is not that the rule against arbitrary arrest is sufficiently clear and established to provide a basis for jurisdiction under the Court's criterion for ATS actions. It is rather that the Court gave almost no weight to inclusion of the rule in the Covenant in making that determination.

#### SUMMARY AND CONCLUSION

Commentators have differed considerably on the validity of non-self-executing declarations in Senate resolutions giving advice and consent to ratification of treaties, from those taking the position that non-self-executing declarations in treaties that are self-executing by their terms are inconsistent with the provision in Article VI that treaties are the supreme law of the land,<sup>114</sup> to those arguing that even treaties lacking a non-self-executing declaration should be presumed to be non-self-executing.<sup>115</sup> Until its recent decision in *Alvarez-Machain II*, however, the Supreme Court had never addressed the validity of non-self-executing declarations. In that decision the Court disposed of the question in one sentence, without any supporting analysis or citation of authority. It simply assumed that the declaration rendered provisions of the Covenant not "enforceable in the federal courts."<sup>116</sup>

Attorneys in various cases before the Court have failed to challenge the validity of this assumption, even where a determination that a non-self-executing declaration was invalid would have meant a ruling in their clients' favor. In *Alvarez-Machain II*, for example, neither the briefs for the plaintiff nor those of any of the *amici* who supported him questioned the validity of the non-self-executing declaration in the Senate resolution giving advice and consent to ratification of the ICCPR. If that declaration had been found

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113. See Sloss, *supra* note 24, at 145. In *Filartega v. Peña-Irala*, 630 F.2d 876 (2d Cir.), *cert. denied*, 442 U.S. 901 (1979), the court relied on the ICCPR, which the United States had not yet ratified, and other treaties to which the United States was not a party, to establish that torture was a violation of "the law of nations." Even in England, where no treaty is self-executing, unincorporated treaties are considered by the courts as evidence of "a general rule of international law." See Higgins, *supra* note 28, at 134; cf. Buergenthal, *supra* note 26, at 360, quoted at the end of note 28 *supra*.

114. See Halberstam, *supra* note 34; Paust, *supra* note 38; and other authorities cited *supra* note 62.

115. See Yoo, *supra* note 38, at 2093 and text accompanying notes 81-82.

116. *Alvarez-Machain II*, 124 S. Ct. at 2767.

invalid, the action for damages would have come within the treaty language of the Alien Tort Statute.<sup>117</sup> Yet the plaintiff cited the Covenant only to show that the rule had attained the status of customary international law. Similarly, in *Sale v. Haitian Centers Council*<sup>118</sup> neither the petitioners, who were seized by the United States on the high seas and forcibly returned to Haiti, nor any of the more than 20 *amici*, argued that the U.S. action was a violation of the ICCPR provision that “[e]veryone shall be free to leave any country, including his own.”<sup>119</sup> Presumably, they did not make that argument because the Senate resolution giving advice and consent to ratification of the ICCPR included a non-self-executing declaration.

Attorneys should challenge the constitutionality of such declarations with respect to treaties or treaty provisions that are self-executing by their terms. The Supreme Court should not simply assume their validity, but should examine them carefully. Whatever one’s views on the validity and effect of a non-self-executing provision, the question is both important and controversial. The Court’s statement in *Alvarez-Machain II*, made without the benefit of argument by counsel, and supported by neither reasoning nor citation of authority, should not be considered dispositive on this question.

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117. *See supra* note 7.

118. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

119. ICCPR, *supra* note 14, art. 12(2). In the *Sale* case the petitioners argued instead that their seizure and return to Haiti violated the Asylum Convention (United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577) and the U.S. implementing legislation then in force (§ 243(h)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1253(h)(1)). *See* 509 U.S. at 166-167.

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