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I.C. Uses of International Law in U.S. Courts

Having set out in broad brush sources and evidence of international law, *supra* § I.B, this chapter now examines ways that such law is used in U.S. courts. These include:

- Direct enforcement of treaty provisions
- Statutory implementation or incorporation of international law
- Application of customary norms and other sources of international law
- Consultation of international sources as an aid to interpretation

Each is discussed in turn below.

1. Direct Enforcement of Treaty Provisions

As noted *supra* § I.B.1.a, the term “treaty” has a singular meaning under the laws of the United States: it is reserved exclusively for those international agreements that come into being according to the procedures contained in the U.S. Constitution.

This section first details constitutional provisions pertinent to treaties, then discusses one use of treaties in U.S. courts, by direct enforcement of treaty terms and by other means.

a. U.S. Constitutional Provisions and Treaty-Making Steps

The Constitution grants treaty-making powers to the political branches of the federal government.² It stipulates that the President

shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

U.S. Const., art. II, § 2[2].

Accordingly, it is the Executive Branch that leads the initial international treaty-making steps of negotiation, adoption, and signature, described *supra* § I.B.1.a.i.

The next steps occur as a matter of U.S. law:

¹ For what this section contains, see the Detailed Table of Contents, <http://www.asil.org/benchbook/detailtoc.pdf>.

² Only the federal government possesses treaty powers. *See* U.S. Const., art. 8, § 10[1] (providing that “[n]o state” in the United States “shall enter into any Treaty, Alliance, or Confederation”).

- The President transmits the treaty to the Senate for its advice and consent to ratification. This is done by way of a transmittal package, which includes the full English version of the treaty text and a State Department report on negotiations and treaty contents, as well, perhaps, as proposed reservations, understandings, and declarations – qualifications discussed *supra* § I.B.1.a.i.5.
- Hearings ensue, most often before the Senate Committee on Foreign Relations. Additional qualifications may be attached in this process.
- Implementing legislation may, but need not always, be proposed and acted upon before a full Senate vote.
- Eventually, the full Senate may schedule a vote on the treaty. If the treaty fails to win two-thirds’ approval, it may be abandoned or, on occasion, scheduled for a new vote at some later date. If advice and consent is given by a vote of two-thirds or more, the Senate’s work is done.
- On receipt of a resolution confirming the Senate’s advice and consent, the Executive Branch prepares the instrument of ratification or accession, which the President signs. On a specified date after the United States deposits its instrument of ratification or accession, the treaty enters into force as to the United States, which then is a full state party to the treaty. *See supra* § I.B.1.a.i.4.

b. How to Determine Which Treaty-Making Steps the United States Has Taken

When it first refers to any treaty, this *Benchbook* provides information on that treaty’s status, including whether the United States is a “signatory” or a “state party” – precise terms of art discussed *supra* § I.B.1.a.i.4. On how to locate that information and other treaty data, for the United States and for other countries, see *supra* § I.B.1.a.i.8.

c. Status of Treaties in U.S. Law

Regarding the status of treaties concluded according to the provisions *supra* § I.C.1.a, the Constitution’s Supremacy Clause states:

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, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const., art. VI[2].

In the event of a conflict between provisions of such a treaty and of a U.S. statute, the provision that took effect later in time prevails. *E.g.*, *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (denying petition for certiorari); *Head Money Cases*, 112 U.S. 580, 599 (1884). Rather than apply the later-in-time rule, courts often will try to reconcile an asserted conflict through canons of construction discussed *infra* § II.A.4.c.

d. U.S. Courts and Direct Enforcement of Treaties

In addition to apportioning treaty powers between the political branches, see *supra* § I.C.1.a, the Constitution describes the jurisdiction of the federal courts with respect to treaties. It states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;....

Id., art. III, § 2[2]. The exercise of this constitutional grant of power applies only to those treaties to which the United States is a party. Moreover, it is subject to the doctrine of treaty self-execution and non-self-execution, discussed below.

i. Doctrine of Treaty Self-Execution and Non-Self-Execution

Upon becoming a party to a treaty, the United States assumes an international obligation to follow the treaty's terms. *See Medellín v. Texas*, 552 U.S. 491, 504 (2008) (writing that rule produced out of treaties to which the United States belongs “constitutes an *international* law obligation on the part of the United States”) (emphasis in original); *see also supra* § I.B.1.a.i.4. The United States – the sovereign that entered into the treaty with other countries – is responsible in the event of noncompliance by any governmental unit, state as well as federal. *See Baldwin v. Franks*, 120 U.S. 678, 683 (1887) (writing that treaties “are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States”); *accord Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (stating, with regard to a self-executing treaty, that because such a “treaty binds the States pursuant to the Supremacy Clause,” states “must recognize the force of the treaty in the course of adjudicating the rights of litigants”).

Whether a federal court may supply a remedy for a treaty breach is a separate question, however. *See id.* at 346-47. The answer frequently turns on a doctrine established in a unanimous Supreme Court judgment, *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). *See also Medellín v. Texas*, 552 U.S. 491, 504-13 (2008) (tracing the doctrine).

Called upon in *Foster* to enforce a treaty, the Court first acknowledged a traditional view of a treaty as “a contract between two nations,” to be “carried into execution by the sovereign power of the respective parties to the instrument.” 27 U.S. (2 Pet.) at 254.³ Chief Justice John

³ Still the rule in Britain and several other common law countries, this view requires the enactment of national legislation that indirectly enforce treaty terms; it is called “dualist” because it treats domestic and international law as separate entities. *See* Mark Weston Janis, *International Law* 87-88, 100-03 (6th ed., 2012). At the other end of the

Marshall's opinion for the Court then declared that "a different principle is established" in the United States, by the terms of its founding charter:

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. But when the terms of the stipulation import a contract, when either of 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.

Id. Derived from this passage and later Supreme Court judgments is the doctrine of self-execution and non-self-execution, as follows:

- *Self-executing*: A treaty provision deemed "equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision," *id.*, operates automatically and may be enforced in U.S. courts as soon as the treaty enters into force for the United States. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (holding that air transportation treaty discussed *infra* § III.D is self-executing); *Warren v. United States*, 340 U.S. 523, 526 (1951) (enforcing as self-executing a provision in a 1939 treaty regarding personal injuries incurred while working on a ship); *Cook v. United States*, 288 U.S. 102, 119 (1933) (holding to be self-executing a U.S.-British treaty to combat liquor smuggling).
- *Non-self-executing*: A treaty provision deemed to "import a contract," because "the parties engage[d] to perform a particular act," *Foster*, 27 U.S. (2 Pet.) at 254, is seen to speak to the obligations of the United States' political branches. A non-self-executing provision is held not to create obligations directly enforceable in U.S. courts. Courts may enforce the content of a non-self-executing treaty provision only if and to the extent that the provision has been implemented domestically via federal legislation or regulations. *See, e.g., Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 44-45, 50 (1913).

A treaty provision is more likely to be held self-executing if the:

- Terms of the provision are concrete and specific;
- Provision confers individual rights susceptible to judicial enforcement; and
- Negotiation context indicates that drafting states intended the provision to have such an effect.

spectrum is the "monist" view, by which a treaty is deemed directly enforceable in a country as soon as it enters into force for that country. *See id.* at 88. In between these two views lies the path marked by the Court in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

Conversely, the more the above factors are absent, the more likely it is that the provision will be held non-self-executing.

i.1. Significance of Political Branch Declarations on Self-Execution or Non-Self-Execution

In recent years, U.S. instruments of ratification frequently have included a declaration – to which the Executive Branch and the Senate agreed in the ratification process – that provisions of the treaty at issue are self-executing or non-self-executing. *See supra* § I.B.1.a.i.5 (discussing reservations, understandings, and declarations). Courts have treated such statements as dispositive. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004).

2. Statutory Implementation or Incorporation of International Law

Federal statutes or regulations may operate to implement terms of treaties the United States has entered. *See supra* § I.C.1.i. U.S. laws also may incorporate international law – treaty provisions and customary international law alike. Implementation and incorporation are discussed in turn below.

a. Legislation Implementing Treaty Provisions

Implementing legislation may operate to make some, but not all, treaty provisions enforceable in U.S. courts. By way of example, the:

- Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, § 105(c), 117 Stat. 650 (2003), codified at 18 U.S.C. § 2423(c) (2006), makes it a crime punishable by up to thirty years' imprisonment for a U.S. citizen or permanent resident to travel overseas to engage in illicit sexual conduct with a child. *See infra* §§ II.A.3.c, III.B.1. This U.S. law implements a treaty-based obligation with respect to the nationality of the accused. *See* 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,⁴ art. 4(2)(a). But it omits mention of another treaty basis for criminal jurisdiction, nationality of the victim. *See id.* art. 4(2)(b).

i. Constitutional Treaty Power and Enactment of Implementing Legislation

In *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court rejected a constitutional challenge to a federal statute implementing a U.S.-Britain treaty concerning migratory birds.

⁴ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, S. Treaty Doc. No. 106-37, 2171 U.N.T.S. 227, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>. This treaty, which entered into force on Jan. 18, 2002, has 166 parties. *See* U.N. Treaty Collection, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en (last visited Feb. 23, 2014). The United States ratified it on Dec. 23, 2002, subject to a reservation and understandings available *id.*

Holding the statute valid, the opinion for the Court by Justice Oliver Wendell Holmes, Jr., referred to the Treaty Clause quoted *supra* § I.C.1.a and the Supremacy Clause quoted *supra* § I.C.1.c, as well as U.S. Const., art. I, § 8[18], which grants Congress the power

To make all Laws which shall be necessary and proper for 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.

Holland, 252 U.S. at 432.

On November 5, 2013, the Court heard argument in *Bond v. United States*, No. 12-158, in which the petitioner called into question the holding in *Holland*. See *Bond v. United States*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/bond-v-united-states-2/> (last visited Feb. 23, 2014). Decision is expected before mid-2014.

Regardless of the decision in *Bond*, implementing legislation may be enacted pursuant to other constitutional powers of Congress; for example, when appropriate, the Foreign Commerce Clause, U.S. Const., art. I, § 8[3].

b. Incorporation of Treaties and Other International Law

Rather than rephrase treaty terms, implementing legislation may incorporate terms of a treaty by reference. An example is the:

- International Child Abduction Remedies Act of 1988, Pub. L. No. 100-300, 102 Stat. 437 (Apr. 29, 1988), codified as amended at 42 U.S.C. § 11601 *et seq.* (2006), which explicitly incorporates the treaty on parental child abduction discussed *infra* § III.B.3.

See also *infra* § III.C (detailing international sale of goods treaty reprinted in full in the U.S. Code).

Statutory incorporation may extend to other sources of international law as well. Examples include the:

- Alien Tort Statute, 28 U.S.C. § 1350 (2006), incorporates both treaty-based and other international law; that is, it grants federal district courts “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.” How to construe “law of nations” and “treaty,” within the framework of this particular statute, is detailed *infra* § III.E.1.
- Supreme Court judgment concerning the first trial of a Guantánamo detainee. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The Court construed a then-applicable provision of the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, which authorized military commissions convened “by the law of war.” *Id.* at 601 (quoting statute). By this phrasing, the Court held, Congress had “‘incorporated by reference’ the common law of war” – a

body of law that included international treaties and customs regulating armed conflict. *Id.* (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942)).

3. Application of Customary Norms and Other International Law Sources

Other sources of international law that may be used in U.S. courts include:

- Customary International Law
- *Jus Cogens* or Peremptory Norms
- General Principles
- “Soft Law”

Each is discussed in turn below.

a. Customary International Law

Frequently cited with respect to customary international law, the other primary source of international law besides treaties, is *Paquete Habana*, 175 U.S. 677 (1900). As quoted in full at the very beginning of this chapter, the Court wrote that “[i]nternational law is part of our law,” to “be ascertained and administered by the courts” in appropriate cases. 175 U.S. at 700; *see supra* § I. It then continued:

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, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

175 U.S. at 700. The Court’s references to the “customs or usages of civilized nations” and, later, to “an ancient usage among civilized nations” which “gradually ripen[ed] into a rule of international law,” *id.* at 686, find echo in the contemporary description of customary international law as general, consistent state practice followed out of a sense of legal obligation. *See supra* § I.B. Likewise resonant is the Court’s description of scholarly works and judicial decisions as means of determining international custom. *See supra* § I.B.3.

Although the passage in *Paquete Habana* specified a role for the courts, there is academic debate on the nature and scope of this role. *Compare* William A. Fletcher, *International Human Rights in American Courts*, 93 Va. L. Rev. 653 (2007) and Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998) with Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

Notwithstanding, courts frequently look to customary international law. Examples:

- In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735-8 (2004), the Court, construing the Alien Tort Statute discussed *supra* § I.C.2.b and *infra* § III.E.1, rejected a claim on the ground that no applicable customary international law norm was violated by the challenged conduct.
- In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), the Court opted for a “rule of construction” that “reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow.” *See infra* §§ II.A.3.f, II.A.4.c.iii, II.B.7.b (discussing case).
- In *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006), a four-Justice plurality would have determined what judicial procedures a military commission by reference to a customary international law norm composed in part by a provision in a treaty the United States has not ratified.

b. *Jus Cogens* or Peremptory Norms

Litigants might invoke *jus cogens* or peremptory norms, described *supra* § I.B.1.c, in cases brought under statutes incorporating international human rights law or implementing provisions in human rights treaties to which the United States belongs. *See generally infra* § III.E. *See also Yousuf v. Samantar*, 699 F.3d 763, 775-78 (4th Cir. 2012) (holding that former government official was not entitled to foreign official immunity for *jus cogens* violations), *cert. denied*, ___ U.S. ___, 2014 WL 102984 (Jan. 13, 2014), *discussed infra* § II.B.1.b.

The only Supreme Court opinion mentioning *jus cogens* did so only in the course of declining to resolve litigants’ dispute. *Graham v. Florida*, 560 U.S. 48, 82 (2010). Their debate about the norm was “of no import,” the Court wrote, given that it considers such international norms while construing the constitution ban on cruel and unusual punishments only to assess “basic principles of decency,” and “not because those norms are binding or controlling.” *Id.*; *see infra* § I.C.4.

c. General Principles

U.S. judicial decisions occasionally have mentioned general principles common to the world’s major legal systems – described *supra* §§ I.B, I.B.2 as a secondary source of international law. *E.g.*, *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399 (4th Cir. 2011); *United States v. Jeong*, 624 F.3d 706, 712 (5th Cir. 2010); *Buell v. Mitchell*, 274 F.3d 337, 371 (6th Cir. 2001); *United States v. Hasan*, 747 F. Supp. 2d 599, 631, 635 (E.D. Va. 2010), *aff’d sub nom. United States v. Dire*, 680 F.3d 446 (4th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 982 (2013).

Research revealed only one federal appellate decision relying on this source. *Phipps v. Harding*, 70 F. 468, (7th Cir. 1895) (considering “general principles adopted by civilized nations” regarding choice of law in contract disputes).

In contrast, general principles often are employed by international arbitral tribunals, discussed *infra* § III.A, and sometimes as well by national courts in countries other than the United States.

d. “Soft Law”

Consistent with the definition of “soft law” as comprising international instruments that do not place firm duties on states, see *supra* § I.B.4, U.S. courts have not found binding obligations based on these instruments alone. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (stating that the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), “does not of its own force impose obligations as a matter of international law”).

A court may be asked to consider a soft law instrument in the course of interpreting domestic law. E.g., *Van Straaten v. Shell Oil Products Co. LLC*, 678 F.3d 486, 489-91 (7th Cir. 2012) (considering a party’s invocation of credit-card standards promulgated by the International Organization for Standardization, <http://www.iso.org/>, a Switzerland-based network of national standards bodies).

A court also may take note of a soft law instrument in support of a conclusion relying for the most part on domestic authorities. See *Estelle v. Gamble*, 429 U.S. 97, 103 n.8 (1976) (citing, among other sources, minimum prisoner treatment standards promulgated by the United Nations).

4. Consultation of International Sources As an Aid to Interpretation

Justices of the Supreme Court at times have consulted foreign and international sources as an aid to interpretation. They have underscored that such sources in no way control a U.S. court’s interpretation; rather, such sources have been treated, when and to the extent relevant in a particular case, as sources of potentially persuasive authority. See *Graham v. Florida*, 560 U.S. 48, 82 (2010), *quoted supra* § I.C.3.b.

The practice is longstanding in capital punishment cases: opinions of the Court have looked to foreign and international sources as indicative, along with domestic sources, of “the evolving standards of decency that mark the progress of a maturing society” – standards from which the Eighth Amendment is said to “draw its meaning.” *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)); see *id.* at 316 n.21 (citing brief filed by the European Union). See also *Graham v. Louisiana*, 560 U.S. 48, 58, 82 (2010); *Roper v. Simmons*, 543 U.S. 551, 576 (2005). In recent years, the practice has spurred some dissents.

On rare occasion, such consultation has occurred in other constitutional cases. See *Lawrence v. Texas*, 539 U.S. 558, 567-73 (2003) (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.) (interpreting Due Process Clause of the Fourteenth Amendment to evaluate claim involving same-sex intimacy); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16

(1997) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.) (same regarding claim involving assisted suicide).