

MAKING HUMAN RIGHTS TREATY LAW ACTIONABLE IN THE UNITED STATES: THE CASE FOR UNIVERSAL IMPLEMENTING LEGISLATION

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INTRODUCTION

There is no more fundamental principle in American law than that “where there is a legal right, there is also a legal remedy.”¹ In 1803, Chief Justice Marshall attributed this tenet to Blackstone, describing it as a “general and indisputable rule.”² This tenet’s transposition is also true, i.e., where there is no legal remedy, there is no legal right. A law that cannot protect is just words on paper. It is an abstract idea, a mere aspiration.

Unfortunately, the four human rights treaties that the United States has ratified are and remain merely aspirational. This is true even though Article VI, Clause 2 of the U.S. Constitution unequivocally states that treaties are the “supreme Law of the Land.”³ The “supreme Law of the Land” unfortunately is not enforceable because the human rights treaties that the United States has ratified have been saddled with RUDs, or “reservations, understandings, and declarations.” The most egregious type of RUD that renders human rights treaties unenforceable is the “non-self-executing” RUD. This RUD transforms what should be powerful tools to protect fundamental rights into empty ceremonial pronouncements.

Many scholars have commented on the United States’ excessive use of RUDs generally, and non-self-executing RUDs in particular. These scholars

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1. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).
2. *Id.*
3. U.S. CONST. art. VI, cl. 2.

have called into question the very constitutionality of RUDs. Other scholars have argued that the human rights treaties themselves do not allow for their own nullification and watering-down by non-self-executing RUDs. This Article summarizes those arguments, but only for the purposes of placing the main arguments of the Article into context.

While this Article discusses RUDs and why they should be eliminated, it goes further. This Article discusses *how* RUDs can be eliminated. It also identifies the many obstacles in our legal system that impede the true adoption of human rights treaties, even after RUDs are lifted. For example, the Article examines how current statutes, such as 42 U.S.C. § 1983 (which is used to enforce constitutional rights), as currently interpreted by the U.S. Supreme Court, would not be particularly helpful for enforcing human rights treaties.

This Article argues that in order for human rights treaties to have maximum impact in the United States, as contemplated by treaty drafters and signatories, it is critical to have universal implementing legislation that would apply to all treaties. This argument is bolstered by pointing out the many deficiencies of Congress's enabling legislation for the Genocide Convention and the Convention Against Torture. Finally, this paper proposes straightforward universal enabling implementing legislation that would make all human rights treaties ratified by the United States actionable in U.S. courts.

Human rights treaties will only become the "supreme Law of the Land," as explicitly mandated in the Constitution's Supremacy Clause,⁴ if and only if human rights violations can be adjudicated and courts can order remedies for human rights violations.

I. HUMAN RIGHTS TREATIES RATIFIED BY THE UNITED STATES ARE NOT ENFORCEABLE

A. *American Exceptionalism*

Even though the United States has played an integral role in both developing and strengthening international human rights globally, the United States has been slow to ratify and enforce the same human rights treaties it helped to formulate. In the late 1940s, the United States was an active participant in the drafting process undertaken by the United Nations Commission on Human Rights.⁵ By 1953, the United States reversed course and announced that it had no intention of ratifying any international human rights treaties.⁶ As noted by William Schabas, "[t]he United States has come

4. *Id.*

5. William Korey, *Human Rights Treaties: Why is the U.S. Stalling?*, 45 FOREIGN AFF. 414, 416-17 (1967).

6. Secretary of State Dulles told the Senate Judiciary Committee on April 6, 1953, that the Eisenhower Administration would not "become a party to any [human rights] covenant or present it as a treaty for consideration by the Senate." *Id.* at 418 (alteration in original) (quoting *Hearings on S.J. Res. 1 and*

kicking and screaming into the modern world of international human rights treaties.”⁷ For example, it took the United States nearly forty years to ratify the uncontroversial Convention on the Prevention and Punishment of the Crime of Genocide.⁸

Embarrassingly, the United States has ratified only four of seven foundational international human rights treaties:

Treaty	In force Globally	Signed by U.S.	Ratified by U.S.
International Covenant on Civil and Political Rights (ICCPR) ⁹	3/23/1976	10/5/1977	6/8/1992
International Covenant on Economic, Social, and Cultural Rights (ICESC) ¹⁰	1/3/1976	10/5/1977	-
Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) ¹¹	1/12/1951	12/11/1948	11/25/1988
International Convention on the Elimination of All Forms of Racial Discrimination (CERD) ¹²	1/4/1969	9/28/1966	10/21/1994
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ¹³	9/3/1981	7/17/1980	-
Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) ¹⁴	6/26/1987	4/18/1988	10/21/1994
Convention on the Rights of the Child (CRC) ¹⁵	9/2/1990	2/16/1995	-

S.J. Res. 43 Before a Subcomm. of the S. Comm. on the Judiciary, 83d Cong., 1st Sess. 10–11 (1953)). This was largely in response to Senator John W. Bricker of Ohio, who sponsored numerous constitutional amendments in the 1950s seeking to restrict the scope of treaties and other international executive agreements. See Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 347 (1995).

7. William A. Schabas, *Spare the RUD or Spoil the Treaty: The United States Challenges the Human Rights Committee on Reservations*, in *THE UNITED STATES AND HUMAN RIGHTS: LOOKING INWARD AND OUTWARD* 110, 110 (David P. Forsythe ed., 2000).

8. Steven V. Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, N.Y. TIMES, Nov. 5, 1988, at 28.

9. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

10. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

11. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); see also 18 U.S.C. § 1091 (2006) (genocide implementation legislation) [hereinafter Genocide Convention].

12. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

13. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

14. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 112 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

15. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

This is an inordinately low number compared with other Western Nations. For example, the United Kingdom,¹⁶ France,¹⁷ Germany,¹⁸ and Canada¹⁹ have either ratified or acceded²⁰ to all the treaties listed above, and have also ratified other human rights treaties, optional protocols, or numerous other regional human rights treaties and instruments.²¹

The United States' poor treaty ratification record is also unusual given the prominence that the Framers of the Constitution gave to treaties. Article VI, Clause 2 of the U.S. Constitution states unequivocally that a treaty, like the Constitution itself, is the "supreme Law of the Land."²² The Constitution sets out a framework for treaty adoption requiring the participation of both the Senate and the President, but not the House of Representatives. The President can ratify a treaty only with the "[a]dvice and [c]onsent" of the Senate.²³ A two-thirds supermajority (instead of the simple majority needed to pass other legislation), however, is required before the Senate consents to a treaty's ratification by the President.²⁴

The ultimate decision to ratify a treaty sits squarely on the shoulders of the President. The Senate cannot constitutionally obligate the President to ratify any treaty,²⁵ but it is active in shaping each treaty. The Senate can

16. *Ratification of International Human Rights Treaties - United Kingdom of Great Britain and Northern Ireland*, U. MINN. HUM. RTS. LIBR., <http://www.umn.edu/humanrts/research/ratification-greatbritain.html> (last visited Oct. 15, 2011).

17. *Ratification of International Human Rights Treaties - France*, U. MINN. HUM. RTS. LIBR., <http://www.umn.edu/humanrts/research/ratification-france.html> (last visited Oct. 15, 2011).

18. *Ratification of International Human Rights Treaties - Germany*, U. MINN. HUM. RTS. LIBR., <http://www.umn.edu/humanrts/research/ratification-germany.html> (last visited Oct. 15, 2011).

19. *Ratification of International Human Rights Treaties - Canada*, U. MINN. HUM. RTS. LIBR., <http://www.umn.edu/humanrts/research/ratification-canada.html> (last visited Oct. 15, 2011).

20. The United Nations defines "accession" as an act whereby a State that has not signed a treaty expresses its consent to become a party to that treaty by depositing an "instrument of accession" with the Secretary-General of the United Nations. Accession has the same legal effect as ratification, acceptance or approval. Unlike ratification, which must be preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession.

Glossary of Treaty Body Terminology, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., <http://www.ohchr.org/english/bodies/treaty/glossary.htm> (last visited Aug. 20, 2011).

21. The United States, however, is not the only country that has not fully integrated treaty obligations into their domestic law. For example, although Australia has ratified the treaties listed in the chart, those same treaties may "not form part of Australia's domestic law unless the treaties have been specifically incorporated into Australian law through legislation." AUSTL. HUM. RTS. COMM'N, *Fact Sheet 7: Australia and Human Rights Treaties* (2009), available at http://www.hreoc.gov.au/education/hr_explained/download/FS7_Australia.pdf (last visited Oct. 15, 2011).

22. U.S. CONST. art. VI, cl. 2.

23. U.S. CONST. art. II, § 2, cl. 2.

24. *Id.* (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.")

25. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d, n.3 (1987). "This power, although not expressly given to the President by the Constitution, has been characterized as a 'power which inheres in the executive power conferred upon him to conduct our foreign relations.'" CONG. RESEARCH SERV., 106TH CONG., STUDY ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. Rep. No. 106-7, at 152 n.33 (Comm. Print 2001) (quoting 40 CONG. REC. S1419 (daily ed. Jan. 23, 1906) (statement of Sen. Spooner)).

demand changes to the text of a treaty before consenting,²⁶ or request that RUDs be submitted with a treaty's ratification instrument. RUDs have been used to acquire the requisite two-thirds of the votes for ratifying human rights treaties.²⁷ RUDs have been attached to all four human rights treaties ratified by the United States.²⁸

Although technically different, the terms "reservations," "understandings," "declarations" and "provisos" are used interchangeably.²⁹ In a study completed by the Congressional Research Service for the Committee on Foreign Relations of the United States Senate, the authors loosely defined the four categories as follows:

- (1) Reservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party.
- (2) Understandings are interpretive statements that clarify or elaborate provisions but do not alter them.
- (3) Declarations are statements expressing the Senate's position or opinion on matters relating to issues raised by the treaty rather than to specific provisions.
- (4) Provisos relate to issues of U.S. law or procedure and are not intended to be included in the instruments of ratification to be deposited or exchanged with other countries.³⁰

Notably, the categorizations, "understandings," "declarations," and "provisos" have been created by practice and are not based on or defined by explicit law.³¹ For example, the Vienna Convention on the Law of Treaties, a treaty not ratified by the United States, makes no mention of anything besides a "reservation" and defines that term broadly: "'[R]eservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it

26. See, e.g., CONG. RESEARCH SERV., *supra* note 25, at 35 (regarding the "Jay Treaty" with Great Britain: "When the final treaty was put before the Senate, the Senate made its consent conditional upon alteration of the treaty. After the revisions requested by the Senate were made and accepted by Britain, the President ratified the revised treaty without further submission to the Senate.").

27. See Charles H. Dearborn, III, Note, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 233 (1978) (relying on JIMMY CARTER, PRESIDENT OF THE UNITED STATES, MESSAGE TO THE SENATE TRANSMITTING FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOC. C, D, E & F, 95-2, at VI (1978)) (the message recommended non-self-executing RUDs because "such declarations, the substantive provisions of the treaties would not of themselves become effective as domestic law").

28. See 132 CONG. REC. 2326 (1986) [hereinafter U.S. Reservations, Genocide Convention]; 136 CONG. REC. 36192 (1990) [hereinafter U.S. Reservations, CAT]; 140 CONG. REC. S7634 (1994) [hereinafter U.S. Reservations, CERD]; U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. 8068 (1992) [hereinafter U.S. Reservations, ICCPR].

29. See, e.g., CONG. RESEARCH SERV., *supra* note 25, at 11, 126.

30. *Id.* at 11.

31. *Id.*

purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”³²

Accordingly, any clarifications submitted with a ratification instrument to all parties to a treaty that exclude or modify “the legal effect of certain provisions” qualify as reservations.³³ This analysis is mirrored in the Restatement (Third) of Foreign Relations Law, which states:

When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an “understanding,” an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another contracting party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.³⁴

Any challenge or acceptance of a qualification submitted with a ratification instrument can make a declaration, understanding or proviso a *de facto* reservation.³⁵ Thus, RUDs interpreting or modifying the treaty can be deemed reservations and interpreted as such.³⁶ Therefore, the term “RUDs” will be used interchangeably with the term “reservations” in this Article.

B. U.S. RUDs to Human Rights Treaties Have Attracted Considerable Criticism Globally and Domestically

Under the laws of the United States, a treaty is, in essence, conceptualized as a contract between nations.³⁷ When a nation attaches a condition to its ratification of a bilateral treaty, the treaty becomes binding when the

32. Vienna Convention on the Law of Treaties art. 2(1)(d), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. See generally Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431 (2004); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002).

33. Vienna Convention on the Law of Treaties, *supra* note 32, at art. 2(1)(d).

34. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 cmt. g.

35. See Richard D. Glick, *Environmental Justice in the United States: Implications of the International Covenant of Civil and Political Rights*, 19 HARV. ENVTL. L. REV. 69, 105 (1995) (“Furthermore, if a nominal ‘understanding’ is determined to constitute a *de facto* reservation, the next question that arises is whether that *de facto* reservation is somehow contrary to the object and purpose of the Political Covenant.”).

36. See, e.g., H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 219 (2d. ed. 2004); see also Richard W. Edwards, Jr., *Reservations to Treaties: The Belilos Case and the Work of the International Law Commission*, 31 U. TOL. L. REV. 195, 195 (2000); Daniel N. Hylton, *Default Breakdown: The Vienna Convention on the Law of Treaties’ Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, 422 (1994); George K. Walker, *Professionals’ Definitions and States’ Interpretive Declarations (Understandings, Statements, or Declarations) For the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461, 498 (2007).

37. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 598 (1884); *Foster v. Nielson*, 27 U.S. 253, 314 (1829).

other party accepts the condition.³⁸ In multilateral treaties, this becomes impractical. As such, the Vienna Convention on the Law of Treaties states that a nation can become party to a treaty even if all the other parties do not accept the treaty's conditions.³⁹

Any party to a treaty can attach reservations to it. Indeed, most countries do so.⁴⁰ But the consistent attachment of multiple RUDs by the United States to essential elements of human rights treaties has "evoked criticism abroad and dismayed supporters of ratification" domestically.⁴¹ The late Professor Louis Henkin argued that RUDs are "designed to reject any obligation to rise above existing law,"⁴² and asserted that "[b]y its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below international standards."⁴³

The many frustrations that practitioners, scholars, and human rights advocates have expressed towards the United States' excessive use of RUDs are exemplified by Jordan Paust's description of President George H.W. Bush's ratification of the ICCPR nearly thirty years after its drafting:

It was a sad day in American legal history when President Bush reiterated previously suggested reservations, understandings, and declarations concerning the 1966 International Covenant on Civil and Political Rights (Covenant), and sadder still when the U.S. Senate, so miserably compliant with the Executive and its failed leadership, unquestionably accepted the Bush Administration's declaration that the treaty should not be self-executing. This is not worth celebrating. Rarely has a formal attempt at adherence to a treaty been so blatantly meaningless and so openly defiant of its terms, the needed

38. Vienna Convention on the Law of Treaties, *supra* note 32, at art. 20(4)(a); *see also General Comment 24(52)*, U.N. GAOR, 52d Sess., 1382d mtg. at 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (stating that an American RUD attached to the ICCPR was inconsistent with the treaty's object and purpose). *But see* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 502-03 (2002) (arguing that the Human Rights Committee General Comment were questionable); Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. OF INT'L L. 277, 299 (1999) ("In order for the Committee to have legal authority over the reservations submitted by states parties, the express consent of the states parties would be required through ratification of an amendment to the Covenant or some similar means.").

39. Vienna Convention on the Law of Treaties, *supra* note 32, at art. 20(4)(a).

40. For example, Jack Goldsmith points out that nearly one-third of the parties to the ICCPR have attached reservations or understandings to "all but one of the rights provisions." Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 3 U. ST. THOMAS L. J. 311, 313 (2005).

41. Henkin, *supra* note 6, at 341.

42. Henkin, *supra* note 6, at 343. For example, the United States attached a reservation to CERD that claims "the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity." U.S. Reservations, CERD, *supra* note 28. By doing so, the United States rejected its international obligation to stamp out private race discrimination "except as mandated by the Constitution and laws of the United States." *Id.* Professor Henkin noted that a narrow reservation would have been appropriate to allay fears that the Convention would be construed to interfere with "[i]ndividual privacy." Henkin also believed that with CERD, "the United States entered a reservation that seems designed not to avoid constitutional difficulties but to resist change in United States law." Henkin, *supra* note 6, at 342.

43. Henkin, *supra* note 6, at 342.

efficacy of its norms, and the very possibility of its direct application as supreme law of the land. And yet this wretched practice ultimately will not prevail. It comes twenty-six years too late to defy a growing normative influence of the treaty and the claims, already millions strong, to basic and effective human rights.⁴⁴

What could have and should have been a strong commitment to international principles already codified and embodied in the Bill of Rights was essentially an empty gesture. The United States attached five reservations, five understandings, and four declarations to the ICCPR before ratifying the treaty.⁴⁵ This was the most of any country.⁴⁶ Those RUDs either directly conflicted with or limited the treaty.⁴⁷

Unfortunately, this practice is the norm rather than the exception for the United States. Professor Henkin categorized the standard-bearing RUDs attached to human rights treaties by the United States into the following five categories:

- (1) The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution.
- (2) United States adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice.
- (3) The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.
- (4) Every human rights treaty to which the United States adheres should be subject to a “federalism clause” so that the United States could leave implementation of the convention largely to the states.
- (5) Every international human rights agreement should be “non-self-executing.”⁴⁸

All five categories of reservations play a part in nullifying the scope of human rights treaties’ reach, and limiting their powers.

44. Jordan J. Paust, *Avoiding “Fraudulent” Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1257 (1993).

45. U.S. Reservations, ICCPR, *supra* note 28.

46. Kristina Ash, Note, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. U. J. INT’L HUM. RTS. xxxvi, xxxvii (2005).

47. See generally U.S. Reservations, ICCPR, *supra* note 28.

48. Henkin, *supra* note 6, at 342.

C. “Non-Self-Executing” RUDs to Human Rights Treaties Have Attracted the Most Criticism

Critics of the United States’ RUD practices agree that the most onerous of the RUDs are “non-self-executing” reservations.⁴⁹ This type of RUD, in particular, effectively nullifies the treaty as a legal instrument that defines the U.S. government’s obligations to its citizens.⁵⁰ Of the four human rights treaties that the United States has ratified, the non-self-executing RUD appears in three; only the Genocide Convention does not contain this RUD.⁵¹ An RUD to the ICCPR states: “[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”⁵² An RUD to the CAT states: “[T]he United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.”⁵³ An RUD

49. See, e.g., Dearborn *supra* note 27, at 233–34; Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241 (1993); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993); 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, 608 (1991); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 133 n.19 (1999); David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183, 1202–03 (1993); David Weisbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 67–69 (1978).

50. The doctrine of self-execution is a long-standing but confusing judicial doctrine created many decades ago. See Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 700 (1995). The doctrine of self-execution has its beginnings in *Ware v. Hylton*, 3 U.S. 199 (1796). Justice Iredell categorized provisions of the Treaty of Paris as “executed, because from the nature of them, they require no further act to be done,” or “executory,” where certain provisions of the treaty implied future action by either the legislative, executive, or judicial branch. *Ware*, 3 U.S. at 272. Notably, Justice Iredell was interpreting a treaty that was signed by the Congress of the Confederation, a Congress acting with different powers than those outlined in the U.S. Constitution for the U.S. Congress. *Id.*

Although the term “self-execution” was not formally used until 1887, the theory was elaborated upon by Justice Marshall in *Foster v. Nielson*, 27 U.S. 253 (1829). Marshall claimed a treaty “is carried into execution . . . whenever it operates of itself.” *Foster*, 27 U.S. at 313–14. Marshall noted the difference from the practice of other countries, where enacting legislation was requisite, and that of the United States, where the “constitution declares a treaty to be the law of the land [and] consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself.” *Id.* at 314. However, he further deduced that when the terms of a treaty “import a contract,” keeping in mind a treaty “is, in its nature, a contract between two nations,” the treaty is to be addressed by political and not judicial forces. *Id.* at 313, 314.

The Supreme Court, in the *Head Money Cases*, summarized the issue more succinctly and stated:

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.

112 U.S. 580, 598–99 (1884).

51. The United States did not affix a self-executing RUD to the Genocide Convention. Nevertheless, implementing legislation was enacted during President Reagan’s administration with the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (codified as amended at 18 U.S.C. §§ 1091–92 (2006)).

52. U.S. Reservations, ICCPR, *supra* note 28.

53. U.S. Reservations, CAT, *supra* note 28.

to CERD states: “[T]he United States declares that the provisions of the Convention are not self-executing.”⁵⁴

Ironically, President Carter, long-recognized as a strong supporter of human rights, was the first to propose attaching non-self-executing RUDs to human rights treaties when he submitted four human rights treaties to the Senate for ratification.⁵⁵ Most likely, he believed that attaching these RUDs was the only politically feasible way for Congress to recommend that the treaties be ratified.⁵⁶

These non-self-executing RUDs are the most detrimental to good faith compliance with human rights treaties.⁵⁷ Non-self-executing RUDs have precluded the enforcement of human rights treaties in American courts. As the Restatement Third of Foreign Relations states, American courts are “bound to give effect to international law and to international agreements of the United States, except that a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”⁵⁸ Conversely, a self-executing treaty can be enforced in court because it has the status of domestic law.⁵⁹ Thus, by creating a reservation that claims a treaty to be non-self-executing, Congress prevents courts from adjudicating private rights of action regardless of the subject or jurisdiction espoused in a human rights treaty.

There is considerable academic criticism of the non-self-executing reservations, including whether or not they are even legally valid under domestic, constitutional, and international law. David Sloss claims that because the executive branch is the primary lawmaker for treaties (the decision to ratify is made by the President), any investigation of whether the treaty has

54. U.S. Reservations, CERD, *supra* note 28.

55. Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, 14 WEEKLY COMP. PRES. DOC. 395, 396 (Feb. 23, 1978); *see also* Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 519 (1991) (“This move was intended to make the treaties more palatable to those who shared Senator Bricker’s aversion to encroachment on areas traditionally falling within state rather than federal jurisdiction. There were differing opinions on what aspects of the treaties would have been self-executing in the absence of the declarations.”).

56. *See* Richard W. Cassidy, Jr., *The United Nations Covenants on Human Rights and the Domestic Law of the United States*, 48 B.U. L. REV. 106, 118 (1968).

57. “The non-self-executing declaration has been explained—and justified—as designed to assure that changes in U.S. law will be effected only by ‘democratic processes’—therefore, by legislation, not by treaty. That argument, of course, impugns the democratic character of every treaty made or that will be made by the President with the consent of the Senate.” Henkin, *supra* note 6, at 346; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, Reporters Note 5, § 115(1)(b) (“That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.”).

58. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3).

59. *See, e.g.*, Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972) (“We also recognize that in the domestic realm courts are not only equipped to enforce self-executing treaties affecting individual rights, but by virtue of the Supremacy Clause are required to do so.”) (citations omitted); *see also* Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial enforcement of Treaties*, 122 HARV. L. REV. 599, 602 (2008).

domestic effect should start with executive intent rather than with the Senate's intent.⁶⁰ Accordingly, Sloss argues:

[T]he conventional wisdom is wrong, insofar as it presumes that the [non-self-executing] declarations reflect a deliberate policy decision that, in the event of a conflict, the objective of avoiding domestication of human rights treaties should always take precedence over the objective of treaty compliance. The treaty makers never made any such deliberate policy decision. Rather, the Executive Branch repeatedly assured the Senate that the conditions included in the U.S. instruments of ratification had successfully eliminated any discrepancy between treaty requirements and preexisting domestic law, thereby ensuring that the United States could comply fully with its treaty obligations without having to domesticate the treaties. Hence, the treaty makers purposefully refused to decide which objective should take precedence in the event of a conflict because the Executive Branch insisted that there would not be a conflict.⁶¹

Due to this constitutional dilemma, scholars have posited the question of whether the Senate even has any authority to include non-self-executing clauses in human rights treaties. For example, Stefan A. Riesenfeld and Frederick M. Abbott have argued that:

[T]he Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts. The Senate has the unicameral power only to consent to ratification of treaties, not to pass domestic [unicameral] legislation. A declaration is not part of a treaty in the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. U.S. courts are bound by the Constitution to apply treaties as the law of the land. They are not bound to apply expressions of opinion adopted by the Senate (and concurred in by the President). The courts must undertake their own examination of the terms and context of each provision in a treaty to which the United States is a party and decide whether it is self-executing. The treaty is law. The Senate's declaration is not law. The Senate does not have the power to make law outside the treaty instrument.⁶²

Professor Henkin agrees:

The U.S. practice of declaring human rights conventions non-self-executing is commonly seen as of a piece with the other RUDs. As

60. See Sloss, *supra* note 49, at 135–36.

61. *Id.*; see also David N. Cinotti, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 *Geo. L.J.* 1277 (2003).

62. See, e.g., Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 *CHI.-KENT L. REV.* 293, 296–97 (1991).

the reservations designed to deny international obligations serve to immunize the United States from external judgment, the declaration that a convention shall be non-self-executing is designed to keep its own judges from judging the human rights conditions in the United States by international standards. To critics, keeping a convention from having any effect as United States law confirms that United States adherence remains essentially empty.⁶³

Like the others, Henkin believes that RUDs are “‘anti-Constitutional’ in spirit and highly problematic as a matter of law.”⁶⁴

Other scholars have argued that the United States’ non-self-executing RUDs are void under international law.⁶⁵ According to Article 19(c) of the Vienna Convention on the Law of Treaties, “[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reserva-

63. Henkin, *supra* note 6, at 346.

64. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 202 (2d ed. 1996); Beharry v. Reno, 183 F. Supp. 2d 584, 594 (E.D.N.Y. 2002) (citing HENKIN, *supra*).

Additionally, the First Circuit’s opinion in *Igartua-de la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005), contained two dissenting opinions that also claim that the non-self-executing reservation practice is illegitimate. At issue was the right of Puerto Ricans to vote for the President and Vice President of the United States based on the Universal Declaration of Human Rights, the Inter-American Democratic Charter of the Organization of American States, and the International Covenant on Civil and Political Rights. *Igartua-de la Rosa*, 417 F.3d at 171.

Of interest here is how a pair of dissenting opinions discussed whether the Senate overstepped its constitutional authority by attaching certain reservations to the aforementioned treaties. One of the dissenters, Judge Howard, expounded upon the Constitutional powers of the Senate under Article II:

Stated differently, the Senate’s power under Article II extends only to the making of reservations that require changes to a treaty before the Senate’s consent will be efficacious. A declaration that only has domestic effect is, in reality, an attempt to legislate concerning the internal implementation of a treaty. But the power to legislate is not granted to the Senate under Article II. Legislation may only be enacted through bicameral adoption and presentation to the President as set forth in Article I.

Id. at 190–91.

Judge Howard applied this reasoning to the ICCPR and stated: “Like the reservation in *Power Authority*, the [non-self-execution declaration in the ICCPR] was not intended to modify the Treaty terms in any way. Thus, it lacks binding force.” *Id.* at 191. The second dissenter, Judge Torruella, agreed, stating emphatically that he “wholeheartedly agree[d] with Judge Howard’s conclusion that [the non-self-execution declaration in the ICCPR] is not binding on this court.” *Id.* at 174.

Highlighting the point that this avenue will take a long time to resolve itself in the courts is the majority’s response:

It would ignore, and undermine, this constitutional allocation of functions for a federal court to declare that the United States was nevertheless “violating” [a treaty like the ICCPR]. In substance, such an exercise would attempt to do what the President and Congress have declined to do, namely, to deploy the treaty provision in an attempt to order domestic arrangements within the United States.

This intrusive course could also embarrass the United States in the conduct of its foreign affairs, which is “committed by the Constitution to the executive and legislative—‘the political’—departments of the government.”

Id. at 150–51.

65. Paust, *supra* note 44, at n.91 (Regarding the ICCPR, “[t]he American Branch of the International Law Association advocated leaving the issue for resolution by the courts, noting that a blanket attempt to prevent U.S. citizens and others from invoking the Covenant is unnecessary and unwise, especially since the United States has not accepted the Optional Protocol to the Covenant. Others, including the ABA, thought that the overriding consideration was prompt ratification and hoped for the early adoption of implementing legislation conforming U.S. law to the Covenant to the extent permitted by the Constitution.” (internal citations omitted)).

tion unless . . . the reservation is incompatible with the object and purpose of the treaty.”⁶⁶ Thus, because the object and purpose of most human rights treaties is to give adequate legal protection for human rights,⁶⁷ disallowing domestic adjudication by claiming a treaty is non-self-executing without accompanying implementing legislation would be an invalid exercise.

These arguments critiquing non-self-executing RUDs under both U.S. and international law are sound. Yet, they are essentially academic,⁶⁸ particularly after the U.S. Supreme Court’s decision in *Medellín v. Texas*. In *Medellín*, the Supreme Court held that there is an implicit presumption against self-execution even in treaties that do not specifically contain non-self-executing RUDs.⁶⁹

D. *Medellín v. Texas: An Implicit Presumption of Non-Self-Execution*

The doctrine of non-self execution is so deeply entrenched,⁷⁰ that the U.S. Supreme Court has read such a clause into a treaty that does *not* contain a non-self-executing RUD. Thus, a human rights treaty that lacks a non-self-executing RUD, may still be deemed non-self-executing, even if the treaty explicitly provides for a private right of action.⁷¹ The Supreme Court

66. Vienna Convention on the Law of Treaties, *supra* note 32, at art. 19.

67. See, e.g., Henkin, *supra* note 6, at 342; Stewart, *supra* note 49, at 1185.

68. Only one court case has directly ruled on the legal effect of a reservation with domestic implication. In *Power Authority v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir.), the D.C. Circuit court heard a case about a treaty between the United States and Canada that regulated the uses of the Niagara River. The Senate, out of concerns about future developments regarding energy generation, attached a reservation that prohibited the redevelopment of Niagara’s waters until Congress gave specific authorization. Canada accepted the reservation “because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada’s rights or obligations under the Treaty.” *Power Auth.*, 247 F.2d at 541.

The New York State Power Authority brought suit when the Federal Power Commission (FPC) denied their license to construct a power plant on the river, claiming the reservation prohibited such activity. The D.C. Circuit court held that the reservation was not part of the treaty and thus was not binding on the FPC. The majority opinion claimed that the Senate’s action must be a “true” reservation that constituted an integral part of the treaty to bind the judiciary under the supremacy clause. Accordingly:

A true reservation which becomes a part of a treaty is one which, alters “the effect of the treaty in so far as it may apply in the relations of [the] State with the other State or States which may be parties to the treaty.” It creates “a different relationship between” the parties and varies “the obligations of the party proposing it . . .”

Id. (second alteration in original) (quoting *Report of the Harvard Research in International Law*, 29 AM. J. INT’L L. Supp. 843, 857 (1935); 2 Charles Cheney Hyde, *International Law Chiefly As Interpreted and Applied by the United States* 1435 (2d. revised ed. 1945); J.L. Brierly, *Special Rapporteur, Report on the Law of Treaties*, U.N. Doc. A/CN. 4/23 cmt. 97, (April 14, 1950)).

If the reservation does not alter the effects of the treaty between the signatories, the reservation does not become part of the treaty. The court remanded the case back to the Federal Power Commission because the reservation “relate[d] to a matter of *purely domestic* concern.” *Power Auth.*, 247 F.2d at 542.

69. *Medellín v. Texas*, 552 U.S. 491, 505–06 (2008). *But see id.* at 533 (Stevens, J., concurring); Vazquez, *supra* note 59.

70. For a greater commentary on the nuances of the doctrine of self-execution see Vazquez, *supra* note 50, at 656.

71. *But see* Steven Lubet, *Prospects for Implementation of the Genocide Convention Under United States Law*, 83 AM. SOC’Y INT’L L. PROC. 323, 324 (1989) (“It is generally understood in the United States that treaties and conventions are not self-executing with regard to criminal law, and that imple-

in *Medellín* departed from the Restatement (Third) of Foreign Relations Law⁷² and held that an implicit presumption against self-execution exists when unambiguous language stating otherwise is absent.⁷³

In *Medellín*, Jose Ernesto Medellín, an eighteen year-old Mexican citizen, was arrested in Texas along with several other gang members in 1993 for rape and murder.⁷⁴ Medellín was convicted and sentenced to death in 1997. On appeal, Medellín claimed that his rights under the Vienna Convention on Consular Relations (VCCR) were violated because he had not been notified of his right to have the Mexican consulate contacted on his behalf as mandated by the treaty.⁷⁵ The Texas Court of Criminal Appeals, the court of last resort for all criminal matters in Texas, upheld the conviction.⁷⁶

Six years later, in 2003, Medellín filed a petition for habeas corpus in the United States District Court of the Southern District of Texas arguing that his conviction was unconstitutional because his rights secured by the VCCR had been violated. Simultaneously, Mexico brought suit against the United States in the International Court of Justice (ICJ) claiming that fifty-one Mexican nationals including Medellín were not adequately informed of their VCCR rights by the United States.⁷⁷ The ICJ ruled in *Case Concerning Avena and Other Mexican Nationals (Avena)* that the United States had violated the rights of fifty-one Mexican nationals, including Medellín, under Article 36(1) and (2) of the VCCR by not notifying the Mexican consulate of their arrests.⁷⁸ The ICJ held that U.S. court systems must determine “whether in each case the violation of Article 36 committed by the compe-

menting legislation is necessary prior to prosecution.”) (writing about the Genocide Convention).

72. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, Reporters Note 5 (“Therefore, if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force.) In that event, a finding that a treaty is not self-executing is a finding that the United States has been and continues to be in default, and should be avoided.”). *But see Medellín*, 552 U.S. at 506 n.3 (“[I]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a); Vazquez, *supra* note 59, at n.131.

73. See John T. Parry, *A Primer on Treaties and § 1983 After Medellín v. Texas*, 13 LEWIS & CLARK L. REV. 35, 39 (2009).

74. *Medellín*, 552 U.S. at 501.

75. Vienna Convention on Consular Relations art. 36(1)(b), *opened for signature* Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967). (“With a view to facilitating the exercise of consular functions relating to nationals of the sending State: . . . [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”).

76. *Medellín*, 552 U.S. at 501.

77. *Case Concerning Avena and Other Mexican Nat’ls (Mex. v. U.S.)*, 2004 I.C.J. 12, 24–25 (Mar. 31) (listing Medellín (#38) among the Mexican nationals).

78. *Id.* at 53–54, 57.

tent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.⁷⁹

Around the time of the ICJ decision, the U.S. District Court for the Southern District of Texas denied Medellín's petition for habeas corpus.⁸⁰ On appeal to the Fifth Circuit, Medellín raised the ICJ's ruling as grounds for habeas corpus relief, but the federal appellate court denied relief.⁸¹ The Supreme Court granted a writ of certiorari.⁸² But before it could hear the case, President George W. Bush issued a memorandum to the U.S. Attorney General ordering states to review convictions of foreign nationals who had not been advised of their rights under the VCCR.⁸³ The U.S. Supreme Court then dismissed Medellín's case as moot.⁸⁴

Medellín then filed a second case in state court for habeas corpus relief based on President Bush's memorandum.⁸⁵ The Texas Courts dismissed Medellín's petition. Subsequently, the U.S. Supreme Court granted certiorari a second time.⁸⁶

The Supreme Court held that the ICJ judgment in *Avena* was not binding federal law.⁸⁷ The Court reasoned that the UN Charter, which purportedly legally obligated the United States to uphold *Avena*, is not self-executing. Thus, it does not mandate domestic enforcement of an ICJ judgment in the United States.⁸⁸ More importantly for the purposes of this Article, the Supreme Court also made clear that when a treaty's language is ambiguous as to its applicability to U.S. law, there is an implicit presumption of non-self-execution. This is true even when the treaty does not explicitly contain a non-self-executing RUD. Scholars have commented that *Medellín* dealt a death knell to enforcing human rights treaties in the United States.⁸⁹ Accord-

79. *Id.* at 60.

80. *Medellín*, 552 U.S. at 502.

81. *Medellín v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004).

82. *Medellín v. Dretke*, 544 U.S. 660, 661–63 (2005) (per curiam).

83. See Mark Sherman, *Bush, Texas Clash Over Death Sentence*, USA TODAY, Oct. 7, 2007, http://www.usatoday.com/news/washington/judicial/2007-10-07-texasexecution_N.htm#; Memorandum from George Bush to the Attorney General (Feb. 28, 2005), available at www.brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf.

84. *Medellín v. Dretke*, 544 U.S. 660, 666–67.

85. *Ex parte Medellín*, 223 S.W.3d 315, 322–23 (Tex. Crim. App. 2006).

86. *Medellín v. Texas*, 552 U.S. 491, 497 (2008).

87. *Id.* at 513–14.

88. *Id.*

89. See Taryn Marks, *The Problems of Self-Execution: Medellín v. Texas*, 4 DUKE J. CONST. LAW & PUB. POL'Y SIDEBAR 191, 207 (2009) ("The most important aspect of this case is its implicit presumption that all treaties are non-self-executing. Though the Court does not explicitly state as such, its decision clearly indicates acceptance of that presumption, and both the concurrence and the dissent identify and express their disagreement with it. Barring an explicit statement that the treaty is self-executing either in the treaty or during the ratification process, under *Medellín's* holding, all treaties are presumed to be non-self-executing.") (internal citations omitted); Parry, *supra* note 73, at 36 ("My conclusions about *Medellín* will therefore not be surprising. The decision not only suggests that treaties are not equal to federal statutes; it also articulates a presumption against finding individual rights in treaties. *Medellín* thus stands against treaty enforcement by individuals."); see also David H. Moore, *Law(Makers) of the Land: The Doctrine of Treaty Non-self-execution* 122 HARV. L. REV. F. 32, 46 ("While the Court did not expressly adopt a presumption against self-execution, the separation of powers presumptions employed in *Medellín* make it more likely that courts will find treaties to be non-self-executing when the treaty-

dingly, the Court affirmed the decision of the Texas Court of Criminal Appeals that dismissed Medellín's habeas corpus application as an abuse of the writ under state law. Medellín was ultimately executed.

Justice Breyer's dissent, which Justice Stevens agreed with in part,⁹⁰ challenged the notion of the presumption of non-self-execution along the same lines as scholars who have been critical of the general doctrine of non-self-execution.⁹¹ In his dissenting opinion, Justice Breyer claimed that "after the Constitution's adoption, while further parliamentary action remained necessary in Britain [for a treaty to become domestic law], further legislative action . . . was no longer necessary in the United States" because the Constitution's Supremacy Clause made treaties the law of the land.⁹²

Justice Breyer cited to *Ware v. Hylton*,⁹³ an opinion written by Justice Iredell, a member of North Carolina's ratifying convention.⁹⁴ In *Ware*, Justice Iredell categorized provisions of the Treaty of Paris as executed, "because from the nature of them, they require no further act to be done," or "executory," where certain provisions of the treaty implied future action by either the legislative, executive, or judicial branches.⁹⁵ According to Justice Iredell, those provisions deemed executed were to be enforced by the judiciary as the law of the land. "Under this Constitution,"⁹⁶ Justice Iredell concluded, "so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for."⁹⁷

As Justice Breyer explains, Justice Iredell's *Ware v. Hylton* opinion was studied carefully by Justice Story, who explained the Founders' reasons for drafting the Supremacy Clause.⁹⁸ In his *Commentaries on the Constitution of the United States*, Justice Story recounted how states considered treaties "not as laws, but like requisitions, of mere moral obligation, and dependent

makers do not expressly indicate otherwise." *But see* Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 546 (2008) ("It would be over-reading the decision, however, to conclude that it supports a presumption against self-execution."); Vazquez, *supra* note 59, at 656 (also citing Bradley, *supra*).

90. Stevens's concurrence noted that "[t]here is a great deal of wisdom in JUSTICE BREYER's dissent" and that he too does "not support a presumption against self-execution." *Medellín v. Texas*, 552 U.S. 491, 533 (2008) (Stevens, J., concurring).

91. *Id.* at 551–62.

92. *Id.* at 543.

93. *Ware v. Hylton*, 3 U.S. 199 (1796).

94. *Medellín*, 552 U.S. at 542 (Breyer, J., dissenting).

95. *Ware*, 3 U.S. at 274 (Iredell, J.); *see also id.* at 244 (opinion of Chase, J.) ("No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature; that other acts shall be done by the Executive; and others by the Judiciary.").

96. Justice Iredell made a point of distinction between the U.S. Constitution and the Articles of Confederation. "[T]his Constitution" is the U.S. Constitution and not the Articles of Confederation. *Ware*, 3 U.S. at 277. As Justice Breyer points out: "Before adoption of the U.S. Constitution, all such provisions would have taken effect as domestic law *only if* Congress on the American side, or Parliament on the British side, had written them into domestic law." *Medellín*, 552 U.S. at 543 (Breyer, J., dissenting).

97. *Medellín*, 552 U.S. at 543 (Breyer, J., dissenting) (quoting *Ware*, 3 U.S. at 277).

98. *Id.* at 542.

upon the good will of the states for their execution.”⁹⁹ The States were ignoring treaty provisions, especially those that dealt with debts with Britain.¹⁰⁰ And the strong language of the Supremacy Clause allowed the federal government to enforce treaty provisions to strengthen the United States’ international reputation.¹⁰¹

Justice Breyer then cited to Chief Justice Marshall who, in *Foster v. Neilson*, wrote that a treaty is “‘the law of the land . . . to be regarded in Courts of justice as equivalent to an act of the legislature’ and ‘operates of itself without the aid of any legislative provision’ unless it specifically contemplates execution by the legislature and thereby ‘addresses itself to the political, not the judicial department.’”¹⁰²

Although not cited by Justice Breyer, his analysis is supported by *The Federalist No. 22*, where Alexander Hamilton explained the necessity of treaty enforcement in domestic courts:

Laws are a dead letter without courts to expound and define their true meaning and operation. 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.¹⁰³

Hamilton’s worries stemmed from the failures of the Articles of Confederation to direct the states to comply with treaty provisions.¹⁰⁴ Under the Articles of Confederation, the United States largely followed the British approach to treaty implementation where treaties were made under the authority of the Crown rather than the Parliament.¹⁰⁵ As such, they were international acts rather than domestic law. Parliamentary action was needed to effectuate the treaty domestically.¹⁰⁶ The federal government had little power to enforce federal laws let alone treaty obligations, and the Supremacy Clause in the U.S. Constitution was instituted to remedy these failures.¹⁰⁷

99. Vazquez, *supra* note 50, at 699 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 696 (1833)); *see also* *Medellín*, 552 U.S. at 543 (Breyer, J., dissenting).

100. *See, e.g.,* *Ware*, 3 U.S. 199.

101. *Medellín*, 552 U.S. at 543 (Breyer, J., dissenting).

102. *Id.* at 544 (Breyer, J., dissenting) (quoting *Foster v. Neilson*, 27 U.S. 253, 314 (1829)).

103. THE FEDERALIST NO. 22, at 112 (Alexander Hamilton) (Ian Shapiro ed., 2009).

104. Vazquez, *supra* note 50, at 698.

105. *Id.* at 697–98.

106. *Id.*

107. Most notably, the states repeatedly violated the Treaty of Peace with Great Britain. *See id.* *See also* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 764 (1988) (“[M]ost of the Framers intended all treaties *immediately* to become binding on the whole nation . . . ; to be applied by the courts whenever a cause or question arose from or touched on them; and to prevail over and preempt any inconsistent state action.”). Compare John C. Yoo, *Treaties and Public Lawmaking*, 99 COLUM. L. REV. 2218, 2256 n.140 (1999) (arguing that § 1983 does not apply to treaties), with Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1146–47 (1992) (arguing the opposite).

The U.S. Supreme Court revisited the *Medellín* decision in July of 2011 in an emergency appeal filed by Huberto Leal Garcia, another Mexican national who was not notified of his rights under the VCCR when he was arrested in Texas. Like *Medellín*, Leal Garcia was sentenced to death.

His counsel moved for an emergency stay of the execution before the United States Supreme Court because Senator Leahy introduced legislation in June 2011 to implement the International Court of Justice's decision in *Avena*.¹⁰⁸ Counsel argued that the Supreme Court should spare Leal Garcia so that he could assert his VCCR claims in a habeas corpus petition. The United States filed an amicus brief in the case urging the stay, and arguing that executing Leal Garcia would put material strains on relations between the United States and Mexico.¹⁰⁹

Nonetheless, the U.S. Supreme Court, in a *per curiam* decision, rejected the stay of execution, citing *Medellín I*. The Supreme Court argued: “[W]e are doubtful that it is ever appropriate to stay a lower court judgment in light of unenacted legislation. Our task is to rule on what the law is, not what it might eventually be.”¹¹⁰ Pending legislation, the opinion declares, is not enough to override a valid death penalty judgment.¹¹¹ “The Due Process clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment.”¹¹² The Court focused on the fact that legislation had been proposed only in the Senate and not in the House of Representatives.¹¹³ Moreover, the Court continued, because the Senate had not enacted legislation in the seven years since the ICJ's *Avena* decision and the three years since the Supreme Court's first *Medellín* decision, the Court had no reason to believe that such legislation would ever pass.¹¹⁴

The *Leal Garcia* decision demonstrates clearly that the current Supreme Court will not honor the United States' treaty obligations unless there is clear congressional intent to do so through enabling legislation. Proposed enabling legislation is not enough to enforce a treaty, neither is Presidential intervention through amicus briefs, or memoranda to the Attorney General ordering treaty implementation.

Despite strong arguments advanced by scholars that non-self-executing RUDs violate both international law and the U.S. Constitution, after *Medellín* and *Leal Garcia* it seems highly unlikely that any lower federal court would find any treaty enforceable as domestic law, regardless of whether it contains a non-self-executing clause. Despite Justice Breyer's dissent, it is clear that if human rights treaties are to become tools for enforcing human rights domestically, there must be a clear mandate from Congress and the

108. *Leal Garcia v. Texas*, 131 S.Ct. 2866, 2867 (2011).

109. *Id.* at 2868.

110. *Id.* at 2867.

111. *Id.*

112. *Id.*

113. *Id.* at 2868.

114. *Id.*

President explicitly stating that a treaty is enforceable in U.S. courts.¹¹⁵ Accordingly, if the President and Congress are serious about enforcing the U.S.'s obligations under the treaties the U.S. has ratified, Congress must not only eliminate non-self-executing RUDs but also enact implementing legislation to enforce *every* treaty. Without these actions, the Supreme Court's holding in *Medellín*—that there is an implicit presumption of non-self-execution—will prevail to nullify any treaty's efficacy.¹¹⁶

II. THE BEST WAY TO ELIMINATE RUDS SO THAT HUMAN RIGHTS TREATIES ARE ENFORCED DOMESTICALLY

Further congressional and executive action is necessary to make human rights treaties enforceable domestically. RUDs can be removed by withdrawal of the RUD by the Senate and the President through the treaty ratification process or through implementing legislation. Due to the political difficulties involved in reaching the two-thirds majority in the Senate required to modify a treaty, implementing legislation, passed by Congress and signed by the President, is the best option for removing RUDs.

A. *Withdrawal of Non-Self-Executing RUDs by the President*

Treaties can be revoked at will by the President.¹¹⁷ In *Goldwater v. Carter*, Senator Barry Goldwater along with a number of colleagues brought suit to stop President Carter from withdrawing the United States from the Mutual Defense Treaty with Taiwan.¹¹⁸ President Carter had not sought the Senate's advice and consent to pull out from the treaty.¹¹⁹ The Supreme Court held that the case was not justiciable, largely because it involved a political question.¹²⁰ Notably, the majority opinion of the D.C. Circuit Court

115. Justice Breyer's dissenting opinion paints a picture of how the majority's opinion will shape litigation: "At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones." *Medellín v. Texas*, 552 U.S. 491, 544 (2008) (Breyer, J., dissenting). He also cites to a handful of multi-lateral treaties that may be affected by the decision. *Id.* at Appendix B.

116. *Id.* at 505.

117. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 ("Under the law of the United States, the President has the power (a) to suspend or terminate an agreement in accordance with its terms; (b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or (c) to elect in a particular case not to suspend or terminate an agreement."); see also John Cary Sims, *The Asymmetrical Nature of the U.S. Treaty Processes and the Challenges That Poses for Human Rights*, 30 HAMLINE J. PUB. L. & POL'Y 223, 237-41 (2008).

118. *Goldwater v. Carter*, 444 U.S. 996 (1979).

119. *Goldwater v. Carter*, 481 F.Supp. 949, 950 (D.D.C. 1979), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

120. However, Justice Powell suggested an avenue for the Senate to protect its "advice and consent" power. See *Goldwater*, 444 U.S. at 997-98 (Powell, J., concurring) ("In this case, a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to a change in the supreme law of the land. Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual

of Appeals stated that “the President did not exceed his authority when he took action to withdraw from the ROC treaty . . . without the consent of the Senate or other legislative concurrences.”¹²¹ More recently, President Bush unilaterally revoked U.S. treaty obligations by withdrawing from the Anti-Ballistic Missile Treaty with Russia without seeking the Senate’s advice and consent.¹²²

Even though the President can revoke a treaty unilaterally, it does not follow that the President could unilaterally revoke non-self-executing RUDs. Doing so would fundamentally change the nature of the treaty, for which the Senate offered its advice and consent. Unilateral revocation of a non-self-executing RUD would override the explicit will of the Senate to keep human rights treaties out of U.S. courts, and thus, would be contrary to how the Constitution frames the two branches’ roles in the ratification process.

B. Withdrawal of Non-Self-Executing RUD by the Senate

One mechanism for withdrawing an RUD is for the President to request Senate consent for withdrawal. On July 27, 1984, President Reagan did that for the Patent Cooperation Treaty.¹²³ In a document entitled “Message to the Senate Transmitting a Patent Cooperation Treaty,” President Reagan formally asked the following of the Senate:

Adherence to chapter II of the Patent Cooperation Treaty is in the best interest of the United States. I recommend, therefore, that the Senate give early and favorable consideration to this matter and give its advice and consent to withdrawing the U.S. reservation previously made under Article 64(1)(a) of the Treaty.¹²⁴

Although Reagan asked for the Senate’s advice and consent to withdraw the reservation, both the Senate and the House of Representatives responded by passing a bill through the regular legislative process—bypassing the normal treaty-making procedures.¹²⁵ Thus, the Senate can pass, and the President

confrontation between the Legislative and Executive Branches. Although the Senate has considered a resolution declaring that Senate approval is necessary for the termination of any mutual defense treaty, no final vote has been taken on the resolution If the Congress chooses not to confront the President, it is not our task to do so. I therefore concur in the dismissal of this case.”).

121. *Goldwater*, 617 F.2d at 709.

122. *See, e.g.*, Manuel Perez-Rivas, *U.S. Quits ABM Treaty*, CNN, Dec. 14, 2001, <http://archives.cnn.com/2001/ALLPOLITICS/12/13/rec.bush.abm> (“The President of the United States has executive authority to negotiate or withdraw the United States from treaties without seeking congressional approval. The Senate has authority only to ratify treaties.”).

123. Message to the Senate Transmitted a Patent Cooperation Treaty, 2 PUB. PAPERS 1102–03 (July 27, 1984), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=40210>.

124. *Id.*

125. Act of Nov. 6, 1986, Pub. L. 99-616, 100 Stat. 3485; *see also* Unity of Invention and Patent Cooperation Treaty, 52 Fed. Reg. 20,038-01, 20,040 (May 28, 1987) (“The Patent Cooperation Treaty became effective for the United States on January 24, 1978. The United States, however, was one of six countries (out of the 40 countries who ratified or acceded to the Treaty), which had reservations not to be

can sign legislation that nullifies particular RUDs. Politically speaking, this is likely an easier course than modifying a treaty through the treaty-making process.

Passing legislation to make clear that Congress is explicitly revoking and replacing a non-self-executing RUD is an easier process than having the Senate revise the treaty by removing an RUD. The two-thirds majority needed for the Senate to approve a new treaty is difficult under any circumstances, but certainly more difficult in the partisan times in which we live.

The U.S. Supreme Court has endorsed Congress's amendment of a treaty with legislation. The Supreme Court has long held that "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."¹²⁶ In the *Head Money Cases*, the Supreme Court was faced with whether an act of Congress that taxed immigrants violated treaty obligations.¹²⁷ The Court held that Congressional acts which "may be found to be in conflict with any treaty with a foreign nation, . . . must prevail in all the judicial courts of this country."¹²⁸

Justice Curtis, sitting as a Circuit Justice in the District of Massachusetts, succinctly outlined the issue when confronted with a conflicting commercial treaty and domestic law:

I think it is impossible to maintain that, under our constitution, the president and senate exclusively, possess the power to modify or repeal a law found in a treaty. If this were so, inasmuch as they can change or abrogate one treaty, only by making another inconsistent with the first, the government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign. That the constitution was designed to place our country in this helpless condition, is a supposition wholly inadmissible.¹²⁹

bound by Chapter II. The document removing the reservation as to Chapter II was deposited with the Director General of the World Intellectual Property Organization on April 1, 1987. Accordingly, Chapter II of the Treaty for the United States of America, Pub. L. 99-616 and these final regulations become effective 3 months later on July 1, 1987.")

126. *Head Money Cases*, 112 U.S. 580, 599 (1884); *see also* Vazquez, *supra* note 50, at 696 (explaining the last-in-time rule).

127. *Head Money Cases*, 112 U.S. at 597.

128. *Id.*

129. *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13799), *aff'd*, 67 U.S. (2 Black) 481 (1862); *see also* Memorandum from Christopher Schroder, Acting Assistant Attorney General, to Alan J. Kreczko, Special Assistant to the President & Legal Adviser to the National Security Council, *Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations Under an Existing Treaty* (Nov. 25, 1996), available at <http://www.justice.gov/olc/treaty.top.htm> (quoting *Taylor* and concluding that "it lies within the power of Congress to authorize the President substantially to modify the United States' obligations under a prior treaty, including an arms control treaty").

Foreign contracts that impose domestic regulation can be modified by statute passed by both houses of Congress and signed by the President.¹³⁰

Furthermore, treaties are held to the last-in-time rule: any legislation passed by Congress can abrogate a treaty after a treaty has been passed.¹³¹ In *United States v. Stuart*, Justice Scalia, in a concurring opinion, stated that Congress “may abrogate or amend [a treaty] as a matter of internal law by simply enacting inconsistent legislation.”¹³² Accordingly, laws enacted by Congress that implement the human rights treaties ratified by the United States will give them domestic legal effect.

Similarly, according to the Restatement (Third) of Foreign Relations, a congressional act can supercede an international agreement in domestic courts “if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.”¹³³

Thus, in order to implement the rights bestowed on the public by international human rights treaties, congressional action is critical. Unlike his authority to revoke treaties, the President cannot unilaterally revoke implementing legislation passed by members of both houses and signed by the President.¹³⁴ Implementing legislation will not only be easier and quicker than lifting non-self-executing RUDs, but it will also buttress the strength of the treaty in the U.S. political system.

C. Previously-Enacted Congressional Implementing Legislation Demonstrates the Need for Having Universal Implementing Legislation

Congress has enacted implementing legislation for only two of the four human rights treaties that the United States has ratified: the Genocide Convention and the Convention Against Torture.¹³⁵ However, the legislative packages Congress passed to implement those treaties are fraught with problems and even nullify portions of the treaties themselves.

As will be discussed below, a close examination of each implementation statute demonstrates how having Congress draft implementing legislation tailored to specific treaties and their specific issues is problematic. The universal implementing legislation that I propose in this Article obviates the need for specialized implementing legislation for each individual treaty, and thus eliminates the possibility that Congress will use implementing legislation to compromise the stated goals and scope of human rights treaties. As such, my proposed implementing legislation preserves the integrity of the treaties that were negotiated by the United States and its allies.

130. *Taylor*, 23 F. Cas. at 786.

131. *United States v. Stuart*, 489 U.S. 353, 375 (1989).

132. *Id.*

133. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 115(1)(a) (1980).

134. *See Head Money Cases*, 112 U.S. 580, 599 (1884).

135. *See* Michelle Friedman, *The Uneasy U.S. Relationship with Human Rights Treaties: The Constitutional Treaty System and Nonself-Execution Declarations*, 17 FLA. J. INT'L L. 187, 227–35 (2005).

1. Implementing Legislation for the Genocide Convention: Too Little Too Late

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was approved by the United Nations General Assembly in 1948¹³⁶ and signed by President Truman shortly thereafter.¹³⁷ President Reagan finally ratified the treaty with the Senate's advice and consent, with multiple RUDs, forty years later, in 1988.¹³⁸ By 1988, however, as Jordan J. Paust points out, genocide, as defined by the treaty, had already been recognized as *crimen contra omens* or, in other words, a crime of customary international law, meaning that the treaty itself had already become universally accepted as law through practice.¹³⁹

Despite the global acceptance of genocide as an international crime, the Senate did not ratify the Genocide Convention in full. Rather, the Senate saddled the treaty with multiple RUDs.¹⁴⁰ Like other RUDs attached to human rights treaties, those attached to the Genocide Convention seek to redefine certain provisions of the treaty.¹⁴¹ For example, the United States attached an RUD to the Genocide Convention that required the Senate's consent for "any dispute to which the United States is a party [for submission] to the jurisdiction of the International Court of Justice under [Article IX of the Convention]."¹⁴²

Congress also asked the President to wait before signing the treaty into law until after Congress passed its own form of domestic genocide legislation.¹⁴³ Thus, the United States became party to the treaty only after the federal government made genocide illegal with the passage of the Genocide Convention Implementation Act of 1987.¹⁴⁴ The Senate's actions draw at-

136. Genocide Convention, *supra* note 11.

137. See Lubet, *supra* note 71, at 323 (noting that the United States was the first country to sign the treaty, but only ratified it decades later).

138. See U.S. Reservations, Genocide Convention, *supra* note 28, at 1377. At the signing-in ceremony, President Ronald Reagan stated: "We finally close the circles today by signing the implementing legislation that will permit the United States to ratify the convention and formally join 97 nations of the world in condemning genocide and treating it as a crime." Ronald Reagan, Remarks on Signing the Genocide Convention Implementation Act of 1987 in Chicago, Illinois (Nov. 4, 1988), available at <http://www.reagan.utexas.edu/archives/speeches/1988/110488b.htm>.

139. Jordan J. Paust, *Congress and Genocide: They're Not Going To Get Away With It*, 11 MICH. J. INT'L L. 90, 90-91 and n.1 (1989); see also Maria Frankowska, *The United States Should Withdraw Its Reservations to the Genocide Convention: A Response to Professor Paust's Proposal*, 12 MICH. J. INT'L L. 141 (1990).

140. See U.S. Reservations, Genocide Convention, *supra* note 28, at 1377.

141. *Id.*

142. *Id.*

143. See Lubet, *supra* note 71, at 323-24; 132 CONG. REC. S. 1378 (daily ed. Feb. 19, 1986); see also, Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 612 (1986). But see U.S. Reservations, Genocide Convention, *supra* note 28.

144. 18 U.S.C. § 1091 (genocide implementation legislation). Even though the Genocide Convention is a criminal rather than a civil issue, the convoluted legislative process described above raises important issues. First and as discussed previously, timing can create problems, because a law passed later in time overrides previous legislation. This is a technical but important issue. Here, the ratification of the Genocide Convention was contingent on Congress passing implementing legislation before ratification: "The Senate's advice and consent is subject to the following declaration: That the President will not deposit

tention to a more insidious problem—the substitution of U.S. legislation for terms negotiated by all parties to a treaty. Because separate implementing legislation was passed, the Genocide Convention itself has yet to become part of federal law.

In enacting anti-genocide legislation, Congress had many options, including to adopt the Convention in full, or at the very minimum, to cite to the Convention. Instead, Congress drafted new language that waters down the treaty and makes it, for the most part, inapplicable to the United States. As Lori Damrosch writes:

The cumulative import of the Genocide Convention's history is that the Senate for its part . . . and the Congress as a whole in adopting the implementing legislation, have expressed an intention to confine the domestic legal effect of the Genocide Convention to such criminal proceedings as may be brought pursuant to the implementing legislation, and have purported to preclude reliance on the Genocide Convention as a source of civilly enforceable rights.¹⁴⁵

Comparing the text of the implementing legislation and the treaty's language, along with RUDs submitted with it, illuminates Damrosch's assertion.

The basic structure for defining the crime of genocide is largely the same. However, certain key provisions of the Genocide Convention reserved by the United States differ. The U.S. implementing legislation defines genocide as:

Whoever, whether in time of peace or in time of war . . . and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—

- (1) kills members of that group;
- (2) causes serious bodily injury to members of that group;

the instrument of ratification until after the implementing legislation referred to in Article V has been enacted." 132 Cong. Rec. S. 1377–78 (daily ed. Feb. 19, 1986). This declaration was not submitted with the ratification instrument, a requisite action needed for an RUD to "attach" to the treaty and become law.

Because there was no formal non-self-executing RUD attached to the Genocide Convention, in this context, there are two sets of laws: the federal implementing legislation and the treaty (three if one includes the *jus cogens* status of genocide). This has the potential to create judicial headaches because the "last-in-time rule" dictates that laws passed later have the effect of overriding previous legislation. Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 725 (2009).

For the most part, the Senate RUDs attached to the Convention duplicate the implementing legislation. Not all do, however. For example, an understanding (reservation) unilaterally attached to the Convention by the United States "did not contain the far more limiting special definition of 'substantial part' that appeared in the legislation enacted prior to ratification." *Id.* It would thus follow that the treaty's definition would override the legislation's definition under the "last-in-time rule." *Id.* (outlining the debates Congress had about the issue).

145. Damrosch, *supra* note 55, at 523.

- (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
 - (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
 - (5) imposes measures intended to prevent births within the group;
 - or
 - (6) transfers by force children of the group to another group;
- . . . shall be punished as provided in subsection (b).¹⁴⁶

The Genocide Convention, however, defines the same offense as:

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁴⁷

The *mens rea* is heightened to “specific intent” in Congress’ implementing legislation, rather than “general intent” as specified in the Convention.¹⁴⁸ This is mirrored in two RUDs attached by the Senate to the Genocide Convention that state:

[(1)] That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.

[(2)] That the term “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such” appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in Article II.¹⁴⁹

Similarly, in its implementing legislation, Congress changed the wording of certain elements of the treaty—most notably, the issue of mental

146. 18 U.S.C. § 1091(a).

147. Genocide Convention, *supra* note 11, at 280.

148. See Paust, *supra* note 144.

149. See U.S. Reservations, Genocide Convention, *supra* note 28, at 1377–78.

harm.¹⁵⁰ The Genocide Convention requires that only general mental impairment be inflicted. Congress's implementing legislation "clarifies" the term "mental harm" by repeating an RUD it submitted with the ratification instrument for the Convention: "That the term 'mental harm' . . . means *permanent* impairment of mental faculties through drugs, torture or similar techniques."¹⁵¹ This severely limits the scope of the requisite action required for conviction of genocide required under Article II of the Genocide Convention.¹⁵² It also waters down the treaty.

Because Congress substituted its own language for that of the treaty's,¹⁵³ prosecution directly under the treaty is largely moot.¹⁵⁴ Additionally, by passing implementing legislation that conflicts with the Convention, the United States is technically and actually in violation of Article V of the treaty, which calls on all State parties to enact necessary legislation to give effect to the Convention's provisions.¹⁵⁵

2. *Congress's Implementing Legislation for the Convention Against Torture: Why Didn't It Put an End to the Debate Over Whether Torture Is Illegal Under U.S. Law?*

The United States also enacted implementing legislation for the Convention Against Torture (CAT), but in a piecemeal package¹⁵⁶ that has watered down the treaty.¹⁵⁷ Like other human rights treaties ratified by the United States, the CAT was ratified in 1994 with multiple RUDs, including a non-self-executing reservation covering Articles 1–16. Those RUDs nullify the treaty's obligations and language.¹⁵⁸

150. See Paust, *supra* note 144.

151. See U.S. Reservations, Genocide Convention, *supra* note 28, at 1377 (emphasis added).

152. See Paust, *supra* note 144.

153. Jordan J. Paust adds this ironic anecdote:

It is of interest that in 2004, in declaring that conduct in Darfur, Sudan was "genocide," the U.S. Senate and House of Representatives used the definition of genocide exactly as it appears in the Genocide Convention. In other words, Congress used the treaty-based and customary definition without the various limitations set forth in present federal legislation that only criminalizes certain forms of genocide.

Paust, *supra* note 144, at 726 (citing S. Con. Res. 133, 108th Cong. § 1 (2004); H.R. Con. Res. 467, 108th Cong. § 1 (2004)).

154. Interestingly, in June 2007, the House of Representatives asked, through a resolution, that the United Nations Security Council charge Iranian President Mahmoud Ahmadinejad with violating the Genocide Convention for his repeated calls for Israel to be annihilated. The House argued that Ahmadinejad violated the Genocide Convention's prohibition against "mental harm." Notably, the House pointed to the treaty's definition (rather than the United States' definition) of mental harm. See H. R. Res. 435, 110th Congress (2007).

155. Genocide Convention, *supra* note 11, at 280 ("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 of any of the other acts enumerated in article III.").

156. Aliens and Nationality, 8 C.F.R. §§ 208.16-208.18 (2011); Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), 22 U.S.C. § 6501 (2006).

157. Convention Against Torture, *supra* note 14, at 113.

158. U.S. Reservations, CAT, *supra* note 28; see also Report of the Committee Against Torture, Twenty-third session (Nov. 8-19, 1999), Twenty-fourth session (May 1-19, 2000), UN doc. A/55/44, at

Despite the CAT's comprehensive nature and unequivocal message that torture violates fundamental human rights, the CAT's implementing legislation is so weak that over a decade after it was ratified by the United States, our government was engaged in a serious debate over whether U.S. operatives could torture while engaged in the "War on Terror."¹⁵⁹

In the United States, the only enforcement mechanism for violations of the CAT is through the Article I immigration courts.¹⁶⁰ But that only allows torture victims from other nations to seek refuge in the United States.¹⁶¹ Administrative law judges who had previously reviewed political asylum applications were charged with also assessing claims under CAT.¹⁶² Although the elements of proof are slightly different under CAT than for seeking asylum, the administrative process is essentially the same.¹⁶³ CAT's safe-haven mechanism should have been only a portion of more comprehensive legislation making torture, as defined by the treaty, a crime punishable in all U.S. states and territories.

The greater majority of the CAT is dedicated to fleshing out the obligations of state parties. The treaty's provisions, as summarized by Hans Danelius,¹⁶⁴ place strong burdens on the treaty's parties to eradicate torture:

- (i) Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture. The prohibition against torture shall be absolute and shall be upheld also in a state of war and in other exceptional circumstances (article 2);
- (ii) No State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture (article 3);

32 ("The Committee recommends that the State party . . . also enact a federal crime of torture in terms consistent with article 1 of the Convention and withdraw its reservations, interpretations and understandings relating to the Convention.")

159. See Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 33 (2006) (referencing the disagreement as to whether detainees are treated correctly under CAT).

160. 8 C.F.R. §§ 208.16-.18; see also Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), 22 U.S.C. § 6501. But see, Samuel L. David, *A Foul Immigration Policy: U.S. Misinterpretation of the Non-Refoulement Obligation Under the Convention Against Torture*, 19 N.Y.L. SCH. J. HUM. RTS. 769 (2003). Pursuant to Article 3 of CAT, the United States cannot "expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture, *supra* note 14, at 114.

161. See Convention Against Torture, *supra* note 14, at 114.

162. See Immigration and Naturalization Service, U.S. Department of Justice, Supplemental Instructions to Form I-589 Application for Asylum and Withholding of Removal (Form I-589S), OMB No. 1115-0086 (1999).

163. Reliance on CAT protection for torture victims has been frequent, although not usually successful. "In 2007, for example, immigration courts considered 28,130 claims for CAT-based relief, and granted such relief in 541 cases." MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 7 (2004).

164. See generally, J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 13-18, 32-99 (1988). Hans Danelius is the former Justice of the Supreme Court of Sweden.

- (iii) Each State party shall ensure that acts of torture are serious criminal offences within its legal system (article 4) [Article 5 requires each State party to take such measures as may be necessary to establish within its jurisdiction Article 4 offenses];
- (iv) Each State party shall, on certain conditions, take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts (article 6);
- (v) Each State party shall either extradite a person suspected of the offence of torture or submit the case to its own authorities for prosecution (article 7);
- (vi) Each State party shall ensure that its authorities make investigations when there is reasonable ground to believe that an act of torture has been committed (article 12);
- (vii) Each State party shall ensure that an individual who alleges that he has been subjected to torture will have his case examined by the competent authorities (article 13);
- (viii) Each State party shall ensure to victims of torture an enforceable right to fair and adequate compensation (article 14).¹⁶⁵

In addition to these major provisions, Article 16 of the treaty requires CAT parties to “prevent . . . acts of cruel, inhuman or degrading treatment or punishment” in “any territory under its jurisdiction.”¹⁶⁶ Unlike other international agreements or public declarations prohibiting torture,¹⁶⁷ Article 1 of CAT actually provides a general definition of torture:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person

165. Hans Danelius, *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (Aug. 23, 2011, 11:19 AM), <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>.

166. Convention Against Torture, *supra* note 14, at art. 16. American implementation of Articles 3–5 (listed in bullet points (ii) and (iii)) will be discussed in more detail than the other provisions.

167. See, e.g., U.N. Charter art. 55 (calling upon U.N. member countries to promote “universal respect for, and observance of, human rights and fundamental freedoms for all”); Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, at 52, UN Doc. A/6216, at art. 5 (1948) (providing that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. mtg. at 49, U.N. Doc. A/RES/2200A (XXI), at art. 7 (1966) (providing that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁶⁸

Actions falling short of this definition may constitute cruel, inhumane, or degrading treatment outlined in Article 16 of the treaty.¹⁶⁹ Under Articles 1 and 4 of the CAT, the definition of torture, as the working definition of the treaty, must be written into the criminal codes of State parties.¹⁷⁰ Articles 4 and 5 respectively require State parties to “ensure that all acts of torture are offences under its criminal law” and “take such measures as may be necessary to establish its jurisdiction over [these] offences.”¹⁷¹

Thus, as a state party, the United States must “ensure that all acts of torture are offences under its criminal law,” as required by Article 4 in these following jurisdictions specified by Article 5:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.¹⁷²

Yet, Congress ignored these directives and did not enact legislation criminalizing torture in the United States. Instead, Congress presumed that acts that would violate CAT would already “be covered by existing applicable federal and state statutes.”¹⁷³ For example, statutes criminalizing assault, manslaughter, and murder were thought to put the United States in compliance, at least nominally.¹⁷⁴

But these domestic criminal provisions, while punishing specific crimes that a torturer might commit while torturing, do not explicitly punish torture. This is significant. By failing to implement all provisions of the CAT domestically, Congress left open the question of whether torture itself was illegal. Congress never explicitly outlawed torture as a crime *inside* the

168. Convention Against Torture, *supra* note 14, at art. 1.

169. Article 16 states:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id. at art. 16.

Notably, the torture memos relied on the differences and the separate itemizations of “cruel, inhuman or degrading treatment” and torture to justify certain enhanced interrogation techniques. *See* Memorandum from Jay Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President 17 (Aug. 1, 2002), available at <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>.

170. Convention Against Torture, *supra* note 14, at art. 1,4.

171. *Id.*

172. *Id.* at art. 4–5 .

173. S. REP. NO. 103–107, at 59 (1993).

174. *Id.*

United States, even though the treaty requires state parties to “ensure that all acts of torture are offences under its criminal law.”¹⁷⁵

To satisfy the jurisdictional requirements of Article 5, Congress passed the Federal Torture Statute (1994). But that statute only criminalizes torture occurring *outside* the United States.¹⁷⁶ Article 2 of CAT states that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”¹⁷⁷ Even with this limited jurisdictional application, the statute defined the “United States” as including “all areas under the jurisdiction of the United States” including “all places and waters, continental or insular, subject to the jurisdiction of the United States.”¹⁷⁸ For example, these jurisdictions would include military bases and buildings abroad. Notably, the 1994 Federal Torture Statute did not criminalize torture occurring in such places. Presumably spurred by the international embarrassment presented by the Abu Gharib prison photos, Congress subsequently amended the statute in 2006 to include those military installations.¹⁷⁹

At or around the time this amendment was enacted, the Bush Administration was called to task publicly for using torture.¹⁸⁰ The infamous, top-secret “Torture Memos” drafted by John Yoo and signed by Jay Bybee during 2002–2005¹⁸¹ are now public knowledge. The memos, which served the basis for a professional misconduct probe of their drafters by Attorney General Eric Holder, Jr. five years later,¹⁸² depict an administration worried about breaking the law.

Specifically, the memos sought to answer whether “certain [enhanced] interrogation methods,” namely waterboarding, violated the Federal Torture Statute, 18 U.S.C. §§ 2340-2340B.¹⁸³ Unfortunately, the Federal Torture Statute does not implement, verbatim, the CAT’s definition of torture. CAT’s strong language broadly condemns intentionally inflicted “severe pain or suffering, whether physical or mental” for purposes of obtaining information or a confession.¹⁸⁴ The Federal Torture Statute does not adopt this definition, but rather, itemizes the definition of “severe mental pain or

175. Convention Against Torture, *supra* note 14, at art. 4; *see also* 18 U.S.C. § 2340(a). (“Whoever *outside* the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”) (emphasis added).

176. 18 U.S.C. §§ 2340-2340B (2006).

177. Convention Against Torture, *supra* note 14, at art. 2.

178. 18 U.S.C. §§ 5, 2340 (1994).

179. “United States” now refers to the several states of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States. *See* 18 U.S.C. § 2340 (2006).

180. *See e.g.*, John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, <http://www.newsweek.com/2004/05/23/the-roots-of-torture.html>.

181. *A Guide to the Memos on Torture*, N.Y. TIMES, available at <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>.

182. Barry et al., *supra* note 180.

183. *See* Bybee, *supra* note 169.

184. Convention Against Torture, *supra* note 14, at art. 1.

suffering.”¹⁸⁵ As clarified by the fourth Torture Memo (a letter from John Yoo to then-Attorney General Alberto Gonzalez), the definition of torture in CAT need not apply, because a U.S. reservation to CAT adopts the language of the Federal Torture Statute.¹⁸⁶

More important, however, is how the Torture Memos relied on a U.S. reservation to CAT regarding the requisite *mens rea*. Similar to the Genocide Convention, CAT requires the torturer to have “general intent,” whereas the U.S. reservation requires “specific intent.”¹⁸⁷ Because of the heightened *mens rea* requirement, a Memo concludes that “even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent.”¹⁸⁸ Thus, according to the Torture Memos, a suspect can be waterboarded 183 times in one month (nearly six times a day),¹⁸⁹ if causing harm is “not [the] objective.”¹⁹⁰ In fact, one of the Memos “discuss[ed] the potential [for] the President to approve the maiming, drugging or applying ‘scalding water, corrosive acid or caustic substance’ on detainees.”¹⁹¹

After declassification and public release of the Torture Memos, Congress sought to formulate specific detainee interrogation practices and debated whether to make torture illegal. Even the outspoken torture critic, Senator John McCain, who was tortured at the “Hanoi Hilton” during the Vietnam War, sided with the Bush administration and voted not to restrict CIA interrogation methods that, under any honest interpretation, constitute torture.¹⁹² Other congressional representatives publicly condemned the use of torture generally, but backed CIA interrogation methods, like water-

185. The Federal Torture Statute defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” The phrase “severe mental pain or suffering” is further defined as:

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2) (2006). Whether the result of such implementation language limits or redefines the requirements for a torture conviction under CAT is debatable. But, as happened with the Genocide Convention, Congress sought to change the treaty’s language.

186. Letter from John Yoo, Deputy Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) available at <http://news.findlaw.com/wp/docs/doj/bybee80102ltr.html>.

187. *Id.*

188. *Id.*

189. Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 19, 2009, <http://www.nytimes.com/2009/04/20/world/20detain.html>.

190. Yoo, *supra* note 186.

191. See Michael Scherer, *Has McCain Flip-Flopped on Torture?*, TIME, Apr. 10, 2008, <http://www.time.com/time/politics/article/0,8599,1729891,00.html>.

192. *Id.*

boarding, with full knowledge that the United States prosecuted Japanese soldiers for torture in World War II for similar acts.¹⁹³

Even though certain interrogation techniques like waterboarding have been declared illegal by the Justice Department¹⁹⁴ and President Obama's 2009 Executive Order,¹⁹⁵ a remorseless President Bush stated in his recent memoirs that when the CIA asked for permission to torture, he responded "damn right."¹⁹⁶

But the "torture" issue is not resolved. On November 12, 2011, during a televised debate, Republican presidential hopefuls Michele Bachmann and Herman Cain stated that waterboarding is not torture, and that they would consider using waterboarding if they were elected President.¹⁹⁷ Mitt Romney, speaking through a spokesperson, on November 14, 2011, agreed with those positions.¹⁹⁸ Only a few days later, freshman Republican Senator Kelly Ayotte of New Hampshire, with the backing of Republican Senators Lindsey Graham of South Carolina, Saxby Chambliss of Georgia, and John Cornyn of Texas, introduced legislation that would repeal President Obama's 2009 Executive Order, which allows only "lawful" interrogations for individuals being held on terrorism charges.¹⁹⁹

This embarrassing and shameful national debate about whether torture is or should be illegal could not take place if the CAT had been ratified and fully implemented into the legal infrastructure of the United States. The world had already defined torture in the CAT. The United States' non-self executing RUD allowed Congress to redefine it, and water it down to such a level that permitted the Abu Ghraib and other similar atrocities to take place without significant legal repercussions.

For these reasons alone it is necessary to enact comprehensive, universal legislation to implement U.S. treaty obligations. That legislation must fully incorporate human rights treaties (as they were negotiated and worded with other nations) into the U.S. legal infrastructure. As shown by the haphazard implementation of the Genocide Convention and the Convention Against Torture, leaving it to Congress to enact implementing legislation for

193. See e.g., Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST, Oct. 5, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>.

194. Laurie Kellman, *Justice Department Says for First Time that Waterboarding is Not Legal Now*, USA TODAY, Feb. 14, 2008, available at http://www.usatoday.com/news/washington/2008-02-14-1603309864_x.htm.

195. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

196. *Bush on Waterboarding: 'Damn right'*, CNN, Nov. 5, 2010, http://articles.cnn.com/2010-11-05/politics/bush.book_1_waterboarding-interrogation-torture-bush-book?_s=PM:POLITICS.

197. Roxana Tiron & Gopal Ratnam, *Republican Candidates Differ on Waterboarding of Terror Suspects*, BLOOMBERG, Nov. 13, 2011, <http://www.bloomberg.com/news/2011-11-13/cain-romney-demand-stronger-action-on-iran-nukes.html>.

198. Editorial, *The Torture Candidates*, N.Y. TIMES, Nov. 14, 2011, <http://www.nytimes.com/2011/11/15/opinion/the-torture-candidates.html>.

199. S. 1867, 112th Cong. (2011) amdt. 1068. Even though the amendment purports to enhance "lawful interrogation methods," its effect is the opposite. It makes all interrogation methods classified, and leaves open to interpretation the definition of "torture." See *Coalition Letter Opposing Amendment 1068 to the National Defense Authorization Act for Fiscal Year 2012 (S. 1867)*, Nov. 22, 2011, available at http://www.aclu.org/files/assets/11_2011_letter_ndaa_ayotte_amend_1068_0.pdf.

each treaty allows Congress to alter each treaty significantly, and to hand-pick only portions of the already-negotiated treaties for implementation. In this Article, I propose implementing legislation that honors the intent of fully-negotiated human rights treaties and allows the federal courts to hear actions arising from violations of human rights treaties. Before discussing that implementing legislation, however, it is necessary to discuss 42 USC § 1983, which on its face appears to be an already-existing vehicle to enforce human rights treaties.

III. WHY USING 42 U.S.C. § 1983 AS IMPLEMENTING LEGISLATION TO ENFORCE TREATIES IS NOT AS GOOD AS ENACTING NEW IMPLEMENTING LEGISLATION

Once Congress strips human rights treaties of non-self-executing RUDs, individuals whose treaty rights have been violated can seek redress through the federal courts, ostensibly through 42 U.S.C. § 1983. Section 1983 is not a source of substantive rights.²⁰⁰ It provides a method for redress where rights conferred in the Constitution and federal laws have been breached.²⁰¹ But even so, as will be discussed below, using § 1983 presents problems and would seriously delay treaty implementation while unresolved legal issues wend their way through the federal courts.

Section 1983, enacted in 1871, sat relatively dormant until 1961 when the Supreme Court held in *Monroe v. Pape* that a family who was subjected to an illegal search and seizure by the Chicago police could sue for money damages under the statute.²⁰² Section 1983 is a very simple statute that states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress²⁰³

Commonly referred to as the “Ku Klux Act,” the statute was enacted as part of the Civil Rights Act of 1871.²⁰⁴ One reason for its passage was to provide civil remedies against abuses being committed against former slaves in southern states.²⁰⁵

The plain language of both § 1983 and the Constitution’s Supremacy Clause seem to imply that enforcement of human rights treaties under §

200. See, e.g., *Baker v. McCollan* 443 U.S. 137, 144 n.3 (1979).

201. *Id.*

202. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

203. 42 U.S.C. § 1983 (2006).

204. See, e.g., *Monroe*, 365 U.S. at 204, 256, 258.

205. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 683 (1978).

1983 would be possible. The Supremacy Clause explicitly states that “[t]his 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.”²⁰⁶ Because ratified treaties are federal law, it would seem to follow that, given the plain language of § 1983, the violation of any rights secured under a particular treaty would automatically be an actionable claim under § 1983.

However, even first year law students know that judicial interpretation often complicates even the most clearly drafted statutes. One cannot assume that every time “law” is mentioned by Congress it means both statutes and treaties.²⁰⁷ In fact, the federal courts have had great difficulty determining what constitutes “and laws” for purposes of § 1983 adjudication. And the Supreme Court has continually narrowed the definition of “and laws.”²⁰⁸ This narrowing underscores the need for new implementing legislation that makes very clear Congress’s intent to allow human rights treaties to be enforced by the courts.

A. *The Problematic Definition of “And Laws” in § 1983*

The Supreme Court in *Maine v. Thiboutout*, the first decision to expound on the scope of the “laws” covered by § 1983, did so quite matter-of-factly.²⁰⁹ The Court held that the word “laws” in § 1983 “means what it says.”²¹⁰ Implying that it was ludicrous for the Court to even address the question, the Court proclaimed: “Congress was aware of what it was doing, and the legislative history [of § 1983] does not demonstrate that the plain language was not intended.”²¹¹ The Court’s analysis followed this simple syllogism:

- Section 1983 says that it protects all rights “secured by the Constitution *and laws*”;
- federal statutes are one of the varieties of “laws”;
- therefore, §1983 protects those rights created by federal statute.²¹²

The Court concluded that “any doubt as to [the meaning of the word “laws”] has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory

206. U.S. CONST. art. VI, § 2.

207. See Parry, *supra* note 73, at 36.

208. See Parry, *supra* note 73, at 37.

209. *Maine v. Thiboutout*, 448 U.S. 1, 4 (1980) (“The question before us is whether the phrase ‘and laws,’ as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents’ claim that petitioners violated the Social Security Act.”).

210. *Id.*

211. *Id.* at 8.

212. *Id.* at 4–7.

as well as constitutional law.”²¹³ Thus, according to *Thiboutout*, “laws” in § 1983 is defined by its plain meaning.²¹⁴

In 1994, this straightforward textual approach was narrowed in *Livadas v. Bradshaw*.²¹⁵ The Supreme Court stated that it had “given that provision the effect its terms require, as affording redress for violations of federal statutes, as well as of constitutional norms” and that “§ 1983 remains a generally and presumptively available remedy for claimed violations of federal law.”²¹⁶

Since *Livadas*, the Supreme Court has twice recalibrated its distinction between “violation of a federal *law*” and “violation of a federal *right*,” making it clear that only in the latter case can § 1983 sustain a federal statutory suit.²¹⁷ In *Blessing v. Freestone*, however, the Supreme Court held that “a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*”²¹⁸ for a claim to be actionable under § 1983.²¹⁹ In *Blessing*, the respondents were five Arizona mothers whose children were eligible for state child support services under Title IV-D of the Social Security Act.²²⁰ Congress mandated through Title IV-D that all states substantially comply with the requirements of the statute.²²¹ The five mothers filed a § 1983 suit claiming that Arizona’s Title IV-D program violated federal law because Arizona’s scheme did not “substantially comply” with the federal requirements of Title IV-D.²²²

The Supreme Court reversed a Ninth Circuit decision that held that “an enforceable individual right to have the State’s program achieve ‘substantial compliance’ with the requirements of Title IV-D” existed.²²³ The Supreme Court held that the Ninth Circuit did not adequately distinguish “among the numerous provisions of [the Title IV-D] program” and held that the statutory scheme could not be “analyzed so generally.”²²⁴ The compliance standard, the Supreme Court held, is an example of an indirect benefit and not a federal right, even if other parts of Title IV-D contained federal rights.²²⁵

Accordingly, the case was remanded to the district court with instructions to “construe the complaint in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting.”²²⁶ Based upon factors framed in *Wilder v. Virginia*

213. *Id.* at 4.

214. *Id.*

215. *Livadas v. Bradshaw*, 512 U.S. 107 (1994).

216. *Id.* at 132–33.

217. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279–83 (2002).

218. *Blessing*, 520 U.S. at 340.

219. *Id.*

220. *Id.* at 332.

221. *Id.* at 335.

222. *Id.* at 332–33.

223. *Id.* at 333.

224. *Id.*

225. *Id.* at 344.

226. *Id.* at 346.

Hospital Association,²²⁷ the Supreme Court in *Blessing* put forward three factors to help the lower courts make its determination:

- (1) whether the plaintiff is an intended beneficiary of the statute;
- (2) whether the plaintiff's asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce; and
- (3) whether the statute imposes a binding obligation on the State.²²⁸

Blessing made clear that in order to be able to bring suit under § 1983, a federal right must be explicit and not general.²²⁹

The Supreme Court, in *Gonzaga University v. Doe*, further reframed and narrowed the definition of federal rights actionable under § 1983.²³⁰ The court required nothing short of “an unambiguously conferred right to support a cause of action Accordingly, it is *rights*, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of that section.”²³¹ In *Gonzaga*, a student brought a suit under § 1983 against the university claiming a violation of a provision of the Family Educational Rights and Privacy Act (FERPA) of 1974.²³²

Under Washington law, an affidavit of good moral character must be submitted by the graduating colleges of all prospective teachers.²³³ The official tasked with certifying such affidavits at Gonzaga University refused to submit such an affidavit after overhearing a conversation where an aspiring teacher's alleged sexual misconduct was being discussed, and even notified Washington state officials of the alleged sexual misconduct.²³⁴ The student claimed that this violated his confidentiality rights under FERPA, “which prohibit[s] the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons.”²³⁵

The Supreme Court denied the claim, holding that the FERPA provision in question did not confer an individual right that would be actionable under § 1983.²³⁶ Instead, FERPA spoke “in terms of institutional policy and practice, not individual instances of disclosure.”²³⁷ The provisions were found to “entirely lack the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights.”²³⁸ As an example, the

227. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990).

228. *Blessing*, 520 U.S. at 338 (relying on *Wilder*, 496 U.S. at 509).

229. *Id.* at 340–41; *see also* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002) (quoting this language).

230. *Gonzaga*, 536 U.S. 273.

231. *Id.* at 283.

232. *Id.* at 277–78.

233. *Id.*

234. *Id.*

235. *Id.* at 274 (citing Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2006)).

236. *Id.* at 290–91.

237. *Id.* at 288 (noting that § 1232g(b)(1)–(2) “prohibit[s] the funding of ‘any educational agency or institution which has a *policy or practice* of permitting the release of education records”).

238. *Id.* at 287 (relying on *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001) and *Cannon v. Univ.*

Gonzaga court explained that unlike Titles VI and IX, which state that “[n]o person . . . shall . . . be subjected to discrimination,” FERPA’s provisions direct the Secretary of Education to withhold the funding of an educational institution that violates the statute.²³⁹ Accordingly, the Supreme Court found that the FERPA provision at issue in *Gonzaga* was not intended to proffer a right.²⁴⁰

The Supreme Court has also narrowed the parameters of “and laws” by finding that it does not include federal statutes that include a remedial scheme: “When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”²⁴¹ In the § 1983 cases discussed above, the Supreme Court looked beyond the plain language of § 1983. It asked not whether statutes were laws, but rather whether the particular statute being invoked for § 1983 redress created enforceable federal rights for the plaintiff.²⁴² In each case, the basic premise—that federal statutes were included within the term “and laws” of § 1983—was taken as settled. But, the Court created an additional step in its analysis requiring a showing of a clear congressional intent to create enforceable rights.

These cases offer some, but not definitive, guidance in determining whether § 1983 also encompasses treaties as categories of federal “laws” with the potential to create protected “rights.” The lower courts split on whether federal *regulations* apply for purposes of § 1983 adjudication further illuminates the importance of clear congressional intent when determining the scope of federal “rights.”²⁴³

In 1985, the D.C. Court of Appeals found that § 1983 could be employed to collect damages for violations of HUD regulations.²⁴⁴ In *Samuels v. District of Columbia*, the court held that “HUD’s grievance procedure regulations clearly have the full force and effect of federal law: they are issued under a congressional directive to implement specific statutory norms and they affect individual rights and obligations.”²⁴⁵

But, in *Smith v. Kirk*, the Fourth Circuit held: “An administrative regulation, however, cannot create an enforceable § 1983 interest not already

of Chi., 441 U.S. 677, 690 n.13 (1979)).

239. *Id.*

240. *Id.* at 296–98.

241. *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981).

242. *See, e.g., Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990) (whether the Medicaid Act creates protected rights); *Suter v. Artist M.*, 503 U.S. 347 (1992) (whether the Adoption Assistance and Child Welfare Act creates protected rights).

243. *See Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985); *Smith v. Kirk*, 821 F.2d 980, 936 (4th Cir. 1987); *see also* John McBrine, *The Selective Use of Administrative Regulations in Creating Rights Enforceable Through § 1983 Actions*, 46 B.C. L. REV 183 (2004); Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983’s “Laws”*, 67 GEO. WASH. L. REV. 51 (1998).

244. *Samuels*, 770 F.2d 184.

245. *Id.* at 199; *see also* D.D. *ex rel. V.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006); *Mungiovi v. Chi. Hous. Auth.*, 98 F.3d 982, 984 (7th Cir. 1996); *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994).

implicit in the enforcing statute. The Supreme Court has never held that one could—to the contrary, members of the Court have expressed doubt that ‘administrative regulations *alone* could create such a right.’²⁴⁶ In less ambiguous terms, the Ninth Circuit in *Save Our Valley v. Sound Transit*, ruled that federal “agency regulations cannot independently create [individual] rights enforceable through § 1983”²⁴⁷

Treaties, like regulations, are not federal statutes. Moreover, treaties are ratified with the advice and consent of only the Senate and not both legislative chambers.²⁴⁸ Arguably, under the case law examining whether regulations are considered “laws” for § 1983 purposes, treaty violations may not be actionable under § 1983 because they were not enacted by Congress as a whole.²⁴⁹

B. Are Treaties Enforceable Under § 1983?

Enforcement of statutory language under § 1983 requires legal provisions that confer substantive rights.²⁵⁰ These rights cannot merely protect or create a “general zone of interest” for an individual.²⁵¹ Recent litigation regarding The Vienna Convention on Consular Relations demonstrates that federal courts are divided on whether § 1983 can be used to enforce treaty rights even when there is a unanimous opinion that a treaty is self-executing.²⁵²

Notably, John T. Parry points out that the phrase “and laws” was enacted as an amendment to the original statute passed as part of the Civil Rights Act of 1871.²⁵³ However, one year after “and laws” was added to § 1983, Congress enacted the predecessor of 28 U.S.C. § 1331.²⁵⁴ Section 1331 states: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”²⁵⁵ The question of why Congress added the word “treaties” to one

246. 821 F.2d at 984 (quoting *Wright v. Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 432 (1987) (O'Connor, J. dissenting)) (emphasis in original).

247. 335 F.3d 932, 939 (9th Cir. 2003).

248. U.S. CONST. art II, § 2, cl. 2.

249. See generally Parry, *supra* note 73.

250. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002).

251. *Id.* at 283; see also *Golden State Transit Corp. v. L.A.*, 493 U.S. 103, 106 (1989) (“[T]he plaintiff must assert the violation of a federal right.”); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 19 (1981) (stating that § 1983 has been construed “as authorizing suits to redress violations by state officials of rights created by federal statutes”).

252. See, e.g., *Cornejo v. Cnty. of San Diego*, 504 F.3d 853 (9th Cir. 2007).

253. Parry, *supra* note 73, at 38; see also *Jogi v. Voges*, 480 F.3d 822, 827 (2007) (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700–01 (1978) (“We are not persuaded that the addition of the words ‘and treaties’ in statutes like § 1331 and 28 U.S.C. § 2241 (and the absence of those words in § 1983) compels a different result. Section 1983 is a statute that was designed to be a remedy ‘against all forms of official violation of federally protected rights,’ when those violations are committed by state actors.”). But see *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 n.7 (1972) (noting § 1983’s predecessor “was enlarged to provide protection for rights, privileges, or immunities secured by federal law”).

254. See Parry, *supra* note 73, at 38 n.15.

255. 28 U.S.C. § 1331. See Act of March 3, 1875, ch. 137, 18 Stat. 470; see also Parry, *supra* note 73, at 42 (“If the 1874 Congress understood the word ‘laws’ to include treaties, why did the 1875 Con-

statute and left it out of § 1983 might be significant. The omission of the word “treaties” in § 1983 compared to its inclusion in § 1331 can suggest that Congress did not intend for § 1983 to encompass treaty violations.²⁵⁶ But, another interpretation is equally convincing. The omission of the word “treaties” in § 1983 may not have been an omission at all since Article VI of the Constitution²⁵⁷ makes clear that treaties are the “supreme Law of the Land.”

*C. The VCCR As a Case Study for Why § 1983 Is Ultimately Inadequate for Enforcing Human Rights Treaties*²⁵⁸

The current circuit court split regarding the enforcement of individual rights enumerated in the Vienna Convention on Consular Relations (VCCR) shows the difficulties of using § 1983 to enforce human rights treaties.²⁵⁹

Completed in 1963, the VCCR is a multilateral treaty that codified consular practices developed through customary international law and multiple bilateral or regional treaties.²⁶⁰ The treaty enumerates obligations of signatory parties and confers individual rights to expatriates detained by arresting authorities.²⁶¹ All circuit courts considering whether the VCCR is enforceable under § 1983 have agreed, either implicitly or impliedly, that the treaty is self-executing. Yet, despite this agreement, there is a circuit court split as to whether § 1983 provides for damages for violations of the VCCR.²⁶²

gress specifically include treaties in addition to laws? But asking the question in this way probably assumes too much. The difference in the two statutes could reflect a substantive decision, but it could also reflect the fact that Congress does not use consistent language when it legislates.”)

256. See *Jogi*, 480 F.3d at 827.

257. U.S. CONST. art. VI, § 1, cl. 2.

258. As John T. Parry discusses, the great majority of cases related to treaties and § 1983 relate to Indian treaties. Most assume that § 1983 can be used to enforce these treaties. See *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515-16 (9th Cir. 2005) (finding that “the hallmark for determining the scope of section 1983 coverage is whether the right asserted ‘is one that protects the individual against government intrusion’” and holding that since the tribe sought “to vindicate communal, rather than individual rights,” they had no claim under § 1983) (quoting *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989)); *United States v. Washington*, 813 F.2d 1020, 1023 (9th Cir. 1987) (noting that if the state violated the Indians’ treaty rights, “there would be an actual conflict between state and federal law which might give rise to a § 1983 action”); *Hoopa Valley Tribe*, 881 F.2d at 663 (“We previously have held that a suit based on the interpretation of treaty rights to take fish is not cognizable under § 1983. The right to self-government may appear more akin to a § 1983-type civil right than the right to take fish. Nonetheless, both rights are grounded in treaties, as opposed to specific federal statutes or the Constitution.” (citations omitted)); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 663 F. Supp. 682 (W.D. Wis. 1987).

Notably, however, unlike other international human rights treaties ratified by the United States, Indian treaties have unique interpretive canons favoring protection of Indians. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth” – How Long a Time is That?*, 63 CAL. L. REV. 601, 617 (1975). Whether these interpretive canons make a large impact on § 1983 litigation is largely unresolved.

259. Compare *Yoo*, *supra* note 107, with *Vázquez*, *supra* note 107.

260. Vienna Convention on Consular Relations (VCCR), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S.

261.

261. *Id.*

262. Compare *Jogi v. Voges*, 480 F.3d 822, 826–27 (2007), with *Cornejo v. Cnty. of San Diego*, 504 F.3d 853 (9th Cir. 2007), *De Los Santos Mora v. N.Y.*, 524 F.3d 183 (2d Cir. 2008), and *Gandara v.*

Only the Seventh Circuit has found that § 1983 can be employed to protect rights secured by the VCCR.²⁶³ The Seventh Circuit also implicitly found that § 1983 could be used to vindicate rights under self-executing treaties.²⁶⁴ The Ninth, Second, and Eleventh Circuits held that the VCCR did not confer individual rights actionable under § 1983.²⁶⁵ Notably, however, those courts did not address whether § 1983 could be used for claims based on rights secured by other treaties.²⁶⁶ They focused specifically on the VCCR and found that the language of the treaty did not confer individual rights clearly enough to permit suit under § 1983 for VCCR violations.²⁶⁷

I. Jogi v. Voges (7th Cir. 2007)

In *Jogi v. Voges*, Tejpaal S. Jogi, an Indian citizen, pleaded guilty to aggravated battery with a firearm and served six years of a twelve-year prison sentence.²⁶⁸ Jogi was never informed of his right to have the Indian consulate informed of his detention pursuant to Article 36(1)(b) of the Vienna Convention.²⁶⁹ Article 36(1)(b) requires that arresting authorities “shall inform the [arrested foreign national] without delay of *his rights*.”²⁷⁰ Accordingly, Jogi filed a *pro se* complaint seeking compensatory, nominal, and punitive damages to remedy this violation under the Alien Tort Statute (ATS) and § 1983 arguing that the VCCR was a “law” of the United States that had been violated by state authorities.²⁷¹ Although the court refrained from ruling on the ATS claim, the Seventh Circuit concluded that § 1983 provided the statutory right of action that Jogi needed for his VCCR claim to proceed.²⁷²

First, the Seventh Circuit determined that a federal right secured by a treaty could proceed under § 1983.²⁷³ Judge Wood, writing for the majority, quoted the following excerpt from *Baldwin v. Franks* :

Bennett, 528 F. 3d 823 (11th Cir. 2008); see also Case Comment, *Foreign Relations Law—Treaty Remedies—Ninth Circuit Holds that § 1983 Does Not Provide a Right of Action for Violations of the Vienna Convention on Consular Relations*, 121 HARV. L. REV. 1677, 1677 (2008) [hereinafter *Foreign Relations Law*].

263. *Jogi*, 480 F.3d at 827–28 (“To read it as excluding protection for the subset of treaties that provide individual rights would be to relegate treaties to second-class citizenship, in direct conflict with the Constitution’s command. We conclude, therefore, that the fact that Jogi is asserting rights under a treaty does not in and of itself doom his case.”).

264. *Id.* at 827.

265. See *Cornejo*, 504 F.3d at 855; *De Los Santos Mora*, 524 F.3d at 192; *Gandara*, 528 F.3d at 825.

266. See cases cited *supra* note 265.

267. See cases cited *supra* note 265.

268. *Jogi*, 480 F.3d at 825. The Seventh Circuit’s first opinion on this case, 425 F.3d 367 (7th Cir. 2005), was withdrawn on rehearing. *Id.* at 824. For more detail, see *International Law—Treaty Remedies—Seventh Circuit Finds Implied Right of Action in Vienna Convention on Consular Relations—Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005), 119 HARV. L. REV. 2644 (2006).

269. *Jogi*, 480 F.3d at 825.

270. VCCR, *supra* note 260, art. 36(1)(b), at 100–01 (emphasis added).

271. *Jogi*, 480 F.3d at 825.

272. *Id.* at 825–27.

273. *Id.* at 827. The *Jogi* court quoted *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), which stated: “The question before us is whether the phrase ‘and laws,’ as used in § 1983, means what it says, or whether it

The United States are bound by their treaty with China to exert their power to devise measures to secure the subjects of that government lawfully residing within the territory of the United States against ill treatment, and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen. But that is not what Baldwin has done. His conspiracy is for the ill treatment itself, and not for hindering or delaying the United States in the execution of their measures to prevent it.²⁷⁴

Accordingly, she concluded that the Supreme Court in *Baldwin* “indicated that a proper claim under the treaty would be cognizable.”²⁷⁵ *Baldwin*, paired with the Supremacy Clause, led the Seventh Circuit to conclude that a § 1983 claim relying on a violation of rights secured by a treaty could proceed.²⁷⁶

After finding the suit could proceed under § 1983, the Seventh Circuit applied a two-step process to determine whether the VCCR created a federal right.²⁷⁷ The first step required the court to find the VCCR self-executing.²⁷⁸

should be limited to some subset of laws.” *Id.* at 826. The United States submitted an amicus curiae brief arguing that “the word ‘laws’ in § 1983 should be read to be restricted to statutes passed by Congress and to exclude treaties.” *Id.* The Seventh Circuit was not persuaded by this “novel” argument because the Supreme Court’s decision in *Baldwin v. Franks*, 120 U.S. 678 (1887), held that § 1983 was not expansive enough to support an action brought by a class of Chinese aliens for federalism reasons, not because “treaties” fell outside its scope. *Id.* at 826–27.

274. *Jogi*, 480 F.3d at 827 (quoting *Baldwin*, 120 U.S. at 693–94).

275. *Id.*; see also *Baldwin*, 120 U.S. at 695 (Harlan, J., dissenting) (“It is also conceded that, in the meaning of that section, a treaty between this Government and a foreign nation is a ‘law’ of the United States”); *id.* at 704–05 (Field, J., dissenting) (“As thus seen, the section is not intended as a protection against isolated or occasional acts of individual personal violence. For such offenses the laws of the states make ample provision. It is intended to reach *conspiracies* against the supremacy and authority of the government of the United States, and against the enforcement of its laws. It is directed, not only against those who conspire to overthrow the government, but those also who conspire to defeat the execution of its laws, including under the latter treaties as well as statutes, and thus permanently deprive others of the rights, benefits, and protection intended to be conferred by such laws.”); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 662 n.36 (1979) (White, J., concurring) (Writing about *Baldwin*, Justice White noted: “Three years later, the Court concluded that discrimination against Chinese in contravention of a treaty between the United States and China would be within the proscription of § 241 but for the language in that statute limiting its application to denials of the rights of ‘citizens.’”).

276. *Jogi*, 480 F.3d at 826; see also *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884) (“A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . The constitution of the United States places such provisions as these in the same category as other laws of congress 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.”).

277. *Jogi*, 480 F.3d at 827 (“The government’s concern that the inclusion of treaties as part of the law of the United States included in § 1983 would flood the courts with cases is overblown. As the government itself urges elsewhere in its filings before us, there are numerous hurdles that must be overcome before an individual may assert rights in a § 1983 case under a treaty: the treaty must be self-executing; it must contain provisions that provide rights to individuals rather than only to states; and the normal

The second step required Jogi to show two related issues: “first, that a personal right can be inferred from Article 36 of the Vienna Convention; and second, that he is entitled to a private remedy.”²⁷⁹

The court held, in no ambiguous terms, that the VCCR was self-executing.²⁸⁰ “[I]t is undisputed that the Convention is self-executing, meaning that legislative action was not necessary before it could be enforced.”²⁸¹ Accordingly, the decision’s result hinged on whether the VCCR promulgated an individual right—just like a federal statute.

The Seventh Circuit analyzed the treaty’s text, debates during the treaty’s drafting, and executive actions to determine the breadth of certain rights under the treaty.²⁸² It also noted the tension between the preamble and the Article 36 of the treaty.²⁸³ The preamble states that the signatories share a realization that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.”²⁸⁴ Whereas, Article 36(1)(b) states:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

...

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.²⁸⁵

The preamble seems to suggest that individual rights are not created by the VCCR, while Article 36 seems to create an individual right for detained citizens of other countries.

Because the language seemingly contradicts itself, in order to determine whether an individual federal right exists in the VCCR, the Seventh Circuit relied on *United States v. Stuart*, which held:

criteria for a § 1983 suit must be satisfied. Only a small subset of treaties, some assuring economic rights and others civil rights, would even be candidates for such a lawsuit.”).

278. *Id.* at 826–30.

279. *Id.* at 827.

280. *Id.* at 830.

281. *Id.*

282. *Id.* at 828–35.

283. *Id.* at 828.

284. VCCR, *supra* note 260, pmb., at 79.

285. VCCR, *supra* note 260, art. 36(1)(b), at 101.

[A] treaty should generally be “construe[d] . . . liberally to give effect to the purpose which animates it” and that “[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred”²⁸⁶

Additionally, the Seventh Circuit followed the principle that “[c]ourts should look to materials like preambles and titles only if the text of the instrument is ambiguous.”²⁸⁷ Thus, the Seventh Circuit found that the language of Article 36 trumps the preamble, and that Article 36 confers an unambiguous federal right.²⁸⁸ Accordingly, the § 1983 claim for a violation of the VCCR was able to proceed, and the case was remanded for adjudication on the merits.

2. *Jogi Is the Outlier of the Circuit Court Decisions Concerning Whether the VCCR Is Enforceable Under § 1983*

Since *Jogi*, several other Circuit Courts have considered whether damages claims can be brought under § 1983 for violations of the VCCR. The Second,²⁸⁹ Ninth,²⁹⁰ and Eleventh²⁹¹ Circuits found that even though the VCCR is self-executing, that, in and of itself, was not sufficient. Notably, they all relied on an analysis similar to that used by the Seventh Circuit. They, however, found that VCCR violations were not actionable under

286. *United States v. Stuart*, 489 U.S. 353, 368 (1989); *see also Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (“Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”).

287. *Jogi v. Voges*, 480 F.3d 822, 834 (2007).

288. *See id.* at 833–34. Since its holding, the district courts under the Seventh Circuit have followed suit; *see, e.g., Gonzalez v. Vill. of W. Milwaukee*, 2010 U.S. Dist. LEXIS 46281 (E.D. Wis. May 11, 2010).

289. In 2008, the Second Circuit in *De Los Santos Mora v. N.Y.*, 524 F.3d 183, 192 (2d Cir. 2008), followed *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007), and held there was no individual right for the violation of Article 36(1)(b) of the VCCR pursuant to § 1983, the Alien Tort Statute, or directly under the VCCR. However, the court limited itself only to “the narrow question of whether a detained alien may vindicate in an action for damages the failure of the detaining authority to inform him of the availability of consular notification and access,” and found the alien could not. *De Los Santos Mora*, 524 F.3d at 187.

290. *Cornejo*, 504 F.3d at 856. The facts of *Cornejo* are almost identical to those of *Jogi*. Yet, the Ninth Circuit reached a different conclusion about whether violations of the VCCR are actionable through § 1983. In *Cornejo*, Ezequiel Nunez Cornejo, a Mexican citizen, was arrested in San Diego in 2003 and brought suit seeking damages and injunctive relief on behalf of himself and other foreign nationals not notified of their rights under the VCCR. *Id.* at 855 (11th Cir. 2008). Notably, the court never questioned whether § 1983 was properly invoked, but assumed that it could be invoked.

291. In 2008, the Eleventh Circuit was presented with a similar question: “whether a foreigner who has been arrested and detained in this country and alleges a violation of the consular notification provisions of the Vienna Convention on Consular Relations (the ‘Treaty’) can maintain an action under 42 U.S.C. § 1983.” *Gandara v. Bennett*, 528 F.3d 823, 825. Although the court found arguments on both sides persuasive, the Eleventh Circuit determined that the VCCR did not confer individual rights and stated that most courts accept a “‘presumption’ against inferring such rights from international treaties” and that “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies.” *Id.* at 828.

§ 1983 because the VCCR did not confer federal rights on individuals, as required by *Gonzaga*.²⁹²

Notably, none of the courts ruled out the possibility of using § 1983 vindicate treaty rights. As stated by the Second Circuit in a footnote:

Because we hold that Article 36(1)(b)(third) does not create rights that can be vindicated in a damages action brought directly under the Convention or pursuant to § 1983, we disagree that plaintiff can state a claim for a private right of action created by the Convention. Nonetheless, we note that assuming *arguendo* that plaintiff has an individual right under the Convention, his claim for damages pursuant to § 1983 would likely be actionable Section 1983 would likely provide a cause of action for damages in the case of a treaty violation in the same manner that § 1983 provides a cause of action for remedying a statutory violation.²⁹³

The three courts seem to all agree with the Seventh Circuit that § 1983 could be employed to vindicate violations of treaty-based rights. However, all three courts held that the text of the VCCR did not meet *Gonzaga's* requirement that the laws of the United States provide an “unambiguously conferred right.”²⁹⁴ In fact, all three concluded that a higher burden must be met because the VCCR is a treaty rather than a federal statute. The Ninth Circuit claimed that “[w]hile treaties *may* confer enforceable individual rights, most courts accept a ‘presumption’ against inferring individual rights from international treaties.”²⁹⁵ Similarly, the Second Circuit stated that “the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights.”²⁹⁶ And [t]he presumption against conferral of individual rights by international treaties requires a clear statement of the treaty drafters’ intent.”²⁹⁷

292. See cases cited *supra* notes 289–291; see also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 274–75 (2002).

293. *De Los Santos Mora*, 524 F.3d at 199 n.23.

294. See *id.* (“[B]ecause § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.”) (citing *Gonzaga*, 536 U.S. at 284); *Cornejo*, 504 F.3d at 858 (“[A]n ‘unambiguously conferred right’ phrased in terms of the person benefitted is essential before a statute—and by extension, a treaty having the force of federal law—may support a cause of action under § 1983.”).

295. *Cornejo*, 504 F.3d at 858–59 (citations omitted).

296. *De Los Santos Mora*, 524 F.3d at 200 (quoting *Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008)).

297. *Id.*; see also *Gandara v. Bennett*, 528 F.3d 823, 828 (11th Cir. 2008). The Eleventh Circuit stated that “[e]ven though treaties may accord enforceable individual rights, most courts accept a ‘presumption’ against inferring such rights from international treaties” and partially relied on the State Department’s position:

[T]he only remedies for failures of consular notification under the Vienna Convention are diplomatic, political, or exist between the states under international law . . . [t]he right of an individual to communicate with his consular official is derivative of the sending state’s right to extend consular protection to its nationals.

Id. at 829.

A high burden exists when using § 1983 to enforce violations of individual rights bestowed by a treaty when explicit language in the treaty's text does not exist.²⁹⁸ Thus, although the Circuit Court cases do not foreclose using § 1983 as a vehicle for enforcing treaty violations, they also make clear that doing so would be very difficult.

D. Section 1983 Could Not Be Used As Implementing Legislation to Enforce All Treaties Because Not All Treaties Confer Individual Rights

Because an individual right must be unambiguously conferred in a treaty's text to make it enforceable under § 1983, that statute may only work to implement some, but not all, human rights treaties. All human rights treaties are not the same. Some human rights treaties have explicit language enumerating individual rights, like the ICCPR,²⁹⁹ while other human rights treaties, like the CERD, appear, on their face, to be contracts between the State parties.³⁰⁰ Based on the Circuit Courts' handling of the VCCR, those falling under the latter category would most likely be held not to provide a private right. Even though the VCCR had both types of language—(1) contractual language in the treaty's preamble and (2) an enumerated right in Article 36—the majority of the Circuit Courts considering the issue gave greater weight to the contractual language than to the individual rights language.³⁰¹

Of the human rights treaties ratified by the United States, this dichotomy is best exemplified by comparing the ICCPR with CERD. The ICCPR states in unambiguous language that every person possesses the rights enumerated in the treaty. For example, Article 6 of the ICCPR states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."³⁰² Similarly, Article 9 of the ICCPR states: "Everyone has the right to liberty and security of person. 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."³⁰³

298. *But see Foreign Relations Law*, *supra* note 263, at 1680; *Cornejo*, 504 F.3d at 865 (Nelson, J., dissenting) ("However, parties such as *Cornejo*, who are only seeking to enforce a statutory violation through § 1983, 'do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.' Instead, '[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.' Thus, the question of whether there was an intent under Article 36(1)(b) to create a private remedy, for which the majority places much weight, is irrelevant to the issue of whether *Cornejo* can enforce the treaty violation through § 1983. Instead, the only question relevant to *Cornejo's* claim is whether Article 36(1)(b) confers individual rights 'on a particular class of persons.'") (internal citations omitted).

299. ICCPR, *supra* note 9.

300. CERD, *supra* note 12, at 216–18.

301. *See Gandara*, 528 F.3d at 826–28; *Cornejo*, 504 F.3d at 861; *De Los Santos Mora*, 524 F.3d at 195–97. *But see Jogi*, 480 F.3d at 833–35.

302. ICCPR, *supra* note 9, at 174.

303. *Id.* at 175.

Even the preamble has language discussing individual rights: The States under the United Nations Charter “[r]ealiz[e] that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”³⁰⁴ Because these examples contain an “unambiguously conferred right,”³⁰⁵ it would seem if the ICCPR were self-executing, that § 1983 could be a vehicle to enforce individual rights contained within it.

By comparison, CERD uses contracting language addressing State parties rather than language conferring individual rights. For example, Article 2 of CERD states:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

- (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
- (e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.³⁰⁶

Accordingly, because CERD places obligations on State parties to act, rather than conferring unambiguous individual rights, it is unlikely that § 1983 could be used as a vehicle to protect violations of CERD, even if CERD were self-executing.

304. *Id.* at 173.

305. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

306. CERD, *supra* note 12, at 216–18.

This means that, according to the VCCR cases, eliminating non-self-executing RUDs will still not make all human rights treaties ratified by the United States actionable under § 1983.³⁰⁷ Further congressional action may still be required to confer rights upon individuals to sue. And based on the majority of VCCR Circuit Court decisions, implementing legislation must firmly establish that individuals have the right to sue pursuant to: (1) individual rights explicitly articulated in a human rights treaty or (2) individual rights contracted through a treaty to be implemented by its signatories.³⁰⁸

Thus, because human rights treaties are different from one another and because the text of human rights treaties may or may not explicitly delineate individual rights in a textual manner appropriate for § 1983 litigation, universal implementing legislation is needed.

E. Using § 1983 to Enforce Treaties Has Many Other Drawbacks

Another reason that § 1983 is not optimal for enforcing human rights treaties is that the U.S. Supreme Court has incorporated many common law tort principles into its legal analyses of cases brought under § 1983, which would prevent the effective enforcement of human rights. One of these principles is that of “good faith” immunity, which later turned into “qualified immunity.”³⁰⁹

The U.S. Supreme Court first articulated good faith immunity in *Pierson v. Ray*,³¹⁰ just six years after *Monroe v. Pape*. *Pierson* arose out of a civil rights lawsuit brought by ministers who attempted to desegregate a bus station in Jackson, Mississippi in 1961. The ministers were arrested pursuant to section 2087.5 of the Mississippi Penal Code, which made it a misdemeanor to assemble in a public place for the purpose of breaching the peace, and for failing to follow police orders to disperse.³¹¹ Section 2087.5 was found to be unconstitutional in a different case³¹² after the ministers were arrested, prosecuted, and convicted.³¹³

When the ministers sued the police officers under § 1983, alleging that the officers violated their constitutional rights, the U.S. Supreme Court found that the officers could not be sued because they were enforcing a law they reasonably believed to be constitutional.³¹⁴ The police officers, the Court stated, could not be expected to know that 2087.5 of the Mississippi Penal Code would subsequently be found unconstitutional.³¹⁵ The Court found that good faith was a viable defense against § 1983 actions, even if

307. See *Gandara*, 528 F.3d at 828; *De Los Santos Mora*, 524 F.3d at 200–01; *Cornejo*, 504 F.3d at 857.

308. See *De Los Santos Mora*, 524 F.3d at 201–04; *Cornejo*, 504 F.3d at 861–63.

309. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

310. 386 U.S. 547 (1967).

311. *Id.* at 549.

312. See *Thomas v. Mississippi*, 380 U.S. 524 (1965).

313. *Pierson v. Ray*, 386 U.S. 547, 550 (1967).

314. *Id.* at 557.

315. *Id.*

the officers were enforcing a law that was subsequently found unconstitutional.³¹⁶ The U.S. Supreme Court quoted from *Monroe v. Pape* in applying good faith immunity, stating:

As we [said in *Monroe*], § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.³¹⁷

Good faith immunity turned into “qualified immunity” in *Harlow v. Fitzgerald*, a 1982 case involving former aides to disgraced President Richard Nixon.³¹⁸ Fitzgerald alleged that Harlow and Nixon were part of a conspiracy to remove him from his position at the U.S. Air Force, and claimed that this conspiracy was in retaliation for whistle-blowing.³¹⁹ In its opinion finding that Harlow was entitled to qualified immunity, citing *Pierson*, the Supreme Court stated:

Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official’s duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken “with independence and without fear of consequences.”³²⁰

In essence, qualified immunity enables a governmental official to say to an innocent victim whose constitutional rights have been violated: “Yes, I admit that I did what you claim I did. But, I am immune from suit and liability because I could not have reasonably known that what I was doing was unconstitutional.”

Qualified immunity has been part of civil rights law for 30 years, and the U.S. Supreme Court has expanded its scope.³²¹ Because qualified immunity is an immunity, not a defense,³²² it may be raised at any time,³²³ by

316. *Id.*

317. *Id.* at 556–57 (citation omitted).

318. 457 U.S. 800.

319. *Id.* at 803–05.

320. *Id.* at 819 (citing *Pierson*, 386 U.S. at 554).

321. See *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Behrens v. Pelletier*, 516 U.S. 299 (1996).

322. *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (rev’d on other grounds).

323. *Langley v. Adams County*, 987 F.2d 1473, 1481 n.3 (10th Cir. 1993); *Goddard v. U.S. Dist. Court (In re Arizona)*, 528 F.3d 652, 659 (9th Cir. 2008). *But see Skrtich v. Thornton*, 280 F.3d 1295, 1306–07 (11th Cir. 2002) (court may decline to hear eleventh-hour argument of affirmative defense when defendant unreasonably delays the proceedings); *Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 667–68 (1st Cir. 1996) (abusive use of qualified immunity defense stricken when filed only for dilatory purposes in a third motion for summary judgment); *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986) (since qualified immunity must be pled by defendant, failure to do so may effect a partial or total waiver of the defense).

any party, including on the eve of trial, or after trial.³²⁴ There is no statute of limitations for invoking qualified immunity, and one does not waive his ability to invoke the immunity if one does not raise it in a timely fashion.³²⁵

Indeed, the U.S. Supreme Court has repeatedly sanctioned raising qualified immunity at the earliest possible stage in litigation, in response to a complaint.³²⁶ The Supreme Court has also encouraged raising qualified immunity before discovery has started.³²⁷

If the trial court denies a motion to dismiss on the basis of qualified immunity, the defendant has an immediate right to an interlocutory appeal of the denial.³²⁸ Policy reasons articulated by the U.S. Supreme Court for offering these procedural perks to defendants include a desire to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”³²⁹

This can have a devastating impact on civil rights plaintiffs who must wait around for years while defendants’ qualified immunity claims wend their way through the trial and appeals courts before the plaintiffs’ cases can even begin. During that time, discoverable evidence can be lost or destroyed (both inadvertently or purposely). Moreover, witnesses can disappear, or their memory of the unconstitutional events can fade.

Another obstacle that qualified immunity erects for plaintiffs who have been harmed is defining “clearly established law.”³³⁰ Because of a recent decision issued by the U.S. Supreme Court, clearly established law may never become clearly established.³³¹ In 2009, the Supreme Court decided *Pearson v. Callahan*, which overturned a 2001 case, *Saucier v. Katz*.³³² In *Saucier*, the Supreme Court established a process for deciding a motion for qualified immunity. First, the trial court had to determine whether the actions alleged by the plaintiff violated the Constitution.³³³ Only after that determination was made could the court decide whether the law concerning the violation was “clearly established.”³³⁴ If it was not, the defendant would be entitled to qualified immunity.³³⁵ *Saucier* was a breath of fresh air because it created a body of law informing both plaintiffs and defendants of what actions constituted constitutional violations, growing the body of “clearly established” constitutional law.

Unfortunately, in 2009, in a unanimous decision, the Supreme Court overturned *Saucier* and rendered the two-step process discretionary rather

324. *Behrens*, 516 U.S. at 311–13.

325. *See supra* note 323 and accompanying text.

326. *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

327. *Harlow*, 457 U.S. at 817–19.

328. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

329. *Harlow*, 457 U.S. at 818.

330. *Id.*

331. *Pearson v. Callahan*, 555 U.S. 223 (2009).

332. *Id.* at 227.

333. 533 U.S. 194, 200 (2001).

334. *Id.*

335. *Id.*

than mandatory.³³⁶ As Justice Alito's opinion explicitly acknowledges, the *Saucier* analytical framework procedure "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."³³⁷ This, from the plaintiffs' standpoint is a good thing. But, the Supreme Court held that requiring courts to conduct a constitutional analysis even when the law was not clearly established conflicted with principles of judicial economy and could have detrimental impact on defendants.

By making the two step *Saucier* process optional, the Supreme Court's ruling encourages courts to sidestep constitutional issues entirely, focusing solely on whether some issue of law is "clearly established."³³⁸ As a result, some constitutional violations may be without a remedy if no court chooses to rule on them, leaving it unclear whether they are or are not against the law. Thus, no subsequent plaintiff will be able to defeat a qualified immunity claim, and governmental misconduct will escape judicial review entirely.

The Supreme Court's incorporation of common law immunities, in the form of qualified immunity, into the constitutional tort context in cases brought under § 1983, makes it more difficult for plaintiffs who have been legitimately harmed to recover damages. This automatically makes it an unappealing statute for adjudicating treaty-based human rights violations. If one were to try to implement human rights treaties by using § 1983, qualified immunity would become part of the analysis and would slow down the adjudication of human rights claims. Moreover, because implementing human rights claims through § 1983 would be a new endeavor, every defendant would be granted qualified immunity because, as of yet, almost nothing is clearly established law. Worse, following *Pearson*, the universe of clearly established law in human rights cases may remain empty, as courts rely on the "clearly established law" doctrine to sweep human rights cases under the rug.

As such, even though § 1983 might be one legal avenue for enforcing treaties, its jurisprudence presents so many obstacles for plaintiffs that it is in human rights victims' better interests to have more direct avenues for seeking redress. As such, it is advisable for Congress to pass new implementing legislation that would clearly make violations of human rights treaties actionable, and that would give courts jurisdiction to hear such claims.

IV. PROPOSED LEGISLATION FOR IMPLEMENTING HUMAN RIGHTS TREATIES

As discussed above, even though § 1983 could arguably be used to implement human rights treaties once non-self-executing RUDs are eliminat-

336. *Pearson*, 555 U.S. at 236.

337. *Id.*

338. *See, e.g., id.* at 236–37.

ed, if treaties are to be truly integrated into U.S. law, it is better for Congress to enact legislation that makes absolutely clear to the judiciary that the treaties ratified by the United States are enforceable.

A. *Proposed Universal Implementing Legislation*

Since the purpose of the legislation is straightforward, the language should be plain and simple. I propose that the following legislation be enacted by Congress to implement human rights treaties:

The district courts shall have original jurisdiction over all civil and criminal actions arising from treaties ratified by the United States, as long as those treaties do not include reservations, understandings, declarations or provisos, or similar instructions, submitted by the President of the United States with a treaty's ratification instrument, declaring those treaties to be non-self-executing.

The district courts shall have injunctive powers to remedy treaty violations regardless of whether those violations were committed under color of any statute, ordinance, regulation, custom, or usage, any municipality, State, or Territory, or the federal government, or the District of Columbia. Where the district courts deem is appropriate, they may also order payment of necessary pecuniary damages.

All citizens of the United States or other persons within its jurisdiction shall have standing to initiate an action under this provision.

B. *Explanation of the Legislation's Components*

1. *Jurisdiction*

The first provision of the proposed legislation is intended to make crystal clear that the only thing that Congress and the President need to do to make a treaty enforceable is to eliminate the treaty's non-self-executing clauses. Doing so would activate the statute's enforcement mechanism. As the § 1983 VCCR cases make clear, the question of whether a treaty is self-executing is the first question that federal courts ask before determining whether they can provide redress to a litigant seeking to enforce the treaty.³³⁹ The non-self-executing requirement in my proposed legislation would save a tremendous amount of judicial resources, as courts would not have to devote time and energy to determine whether a treaty was self-executing and intended by Congress to provide a cause of action. My legislative provision would, on its face, counter the presumption of non-self-execution articulated by the Supreme Court in *Medellín*.

339. See cases cited *supra* note 265.

2. *All Governmental Entities at All Levels Are Expected to Honor Human Rights Obligations*

It is well settled that once a country ratifies a human rights treaty, the country is obligated to enforce that treaty at every level of government. The United States fully understands this obligation. Indeed, in 2010, the U.S. State Department's Legal Adviser, Harold Koh, who is charged with, among other things, reporting to the United Nations on the United States' compliance with its obligations under international treaties, sent two letters to state officials taking precisely this position. In a May 3, 2010 letter sent to "State and Local Human Rights Commissions," Koh states, in pertinent part:

I am writing concerning three human rights reports that the United States will be submitting to the United Nations (UN) in 2010 and 2011. These reports concern implementation of U.S. obligations under the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

....

As you may be aware, implementation of U.S. human rights treaty obligations is carried out not only by the federal government, but also by state and local governments, through work such as that done by your commissions. The UN committees to which these reports will be submitted are interested in receiving information on programs and activities undertaken by states, counties and other local jurisdictions in the human rights area. Thus, we are reaching out to you for information on your programs and activities relevant to these three reports.³⁴⁰

Additionally, a January 20, 2010 memorandum that Koh sent to all state governors states, in pertinent part:

This electronic communication contains information on several human rights treaties to which the United States is party, and which are implemented through existing laws at all levels of government (federal, state, insular and local). To promote knowledge of these treaties in the United States, we would appreciate your forwarding this communication to your Attorney General's office, and to the

340. Letter from Harold Hongju Koh, U.S. Legal Adviser, to State and Local Human Rights Commissions (May 3, 2010), available at http://www.iaohra.org/storage/pdf/human-rights-campaign/Letter_from_HaroldKoh_to_Stateand%20LocalCommissions.pdf.

departments and offices that deal with human rights, civil rights, housing, employment and related issues in your administration.

...

... Because implementation of these treaties may be carried out by officials at all levels of government (federal, state, insular, and local) under existing laws applicable in their jurisdictions, we want to make sure that the substance of these treaties and their relevance to the United States is known to appropriate governmental officials and to members of the public.³⁴¹

Many Human rights experts have disagreed with Koh's message that treaty obligations can be met with existing law.³⁴² But Koh's letters are instructive in that they state, unequivocally, that treaties must be enforced at every level of government.³⁴³

3. *Protecting Only Citizens and Legal Residents v. Protecting All Persons*

One potential sticking point for treaty implementation is determining who can bring a claim under the treaties. By definition, human rights belong to every human, regardless of race, gender, sexual orientation or immigration status.

It would be most unusual for a statute specifically enacted to enforce the United States' human rights obligations, to exclude a large portion of undocumented individuals living and working in the United States. This is particularly true because that segment of the population is the target of violent hate crimes³⁴⁴ and is often exploited in the workplace.³⁴⁵

341. Memorandum from Harold Hongju Koh, U.S. Legal Adviser, to State Governors (January 20, 2010), available at <http://www.state.gov/documents/organization/137292.pdf>.

342. As David Sloss points out, "[m]any international-law scholars agree that the scope of substantive rights protected under international human rights treaties is broader, in certain respects, than the scope of substantive rights protected by federal constitutional and statutory law." *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1112 (2000). In support, Sloss cites how some have argued that the ICCPR has stronger protections for religious freedom than those guaranteed by the U.S. Constitution, as applied and interpreted by the U.S. Supreme Court. *Id.* He cites Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 661 (1998) (stating that ICCPR 'appears to demand more protection of religious freedom than is required by [recent] U.S. Supreme Court[] decisions') and Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 43 (1997) (stating that Article 18 of ICCPR expresses broader conception of religious liberty than U.S. Supreme Court's interpretation of free exercise). *Id.* at n.39.

343. See *supra* notes 340–341.

344. See, e.g., Manny Fernandez, *Guilty Verdict in Killing of Long Island Man*, N.Y. TIMES, Apr. 19, 2010, <http://www.nytimes.com/2010/04/20/nyregion/20patchogue.html> ("Advocates for immigrants criticized the Suffolk County Police Department for failing to fully investigate complaints of assaults on Latinos, and also criticized some county leaders and politicians for fueling the hostility with anti-immigrant statements. Federal authorities are investigating the department's handling of reports of racially motivated attacks on Hispanics.").

Globally, human rights treaties protect not only minority groups, but also undocumented individuals. David Cole, writing on the confluence of human rights treaties and immigrant rights, notes that:

[H]uman rights are just that—*human* rights—and therefore generally do not acknowledge distinctions between citizens and noncitizens. The rights identified and protected in international human rights treaties derive from human dignity, and dignity does not turn on the type of passport or visa a person holds.³⁴⁶

Indeed, his scholarship highlights a landmark ruling of the Law Lords of Great Britain who invalidated a “statute authorizing indefinite preventive detention of foreign nationals who were suspected terrorists.”³⁴⁷ The Court found that the obligations of the European Convention on Human Rights conflicted with the statute and that a suspected terrorist posed the same threat as a British citizen or as an immigrant.³⁴⁸

Allowing all persons to sue for human rights violations presents political problems in the United States, where immigration cyclically become a hot-button issue and where state and federal prerogatives collide. This is exemplified by certain states, like Arizona, which have sought to rectify congressional inaction on immigration law by enacting their own draconian (and unconstitutional) immigration laws.³⁴⁹

But human rights treaties must protect all humans, not only those who have proper documentation. Human rights treaties would not invalidate U.S. immigration laws. They would just ensure that in enforcing its federal immigration laws, the United States would have to abide by the commitments it made to the international community as embodied in ratified human rights treaties.

4. *Injunctive Relief v. Money Damages*

The second provision of the proposed legislation gives federal courts the power to issue injunctive relief to remedy treaty violations. I have purposely left out a provision allowing for money damages beyond the possibility of necessary pecuniary damages. There are several reasons why it is

345. See, e.g., Julia Preston, *After Iowa Raid, Immigrants Fuel Labor Inquiries*, N.Y. TIMES, July 27, 2008, <http://www.nytimes.com/2008/07/27/us/27immig.html> (“Now those young immigrants have begun to tell investigators about their jobs. Some said they worked shifts of 12 hours or more, wielding razor-edged knives and saws to slice freshly killed beef. Some worked through the night, sometimes six nights a week.”); *Congress Puts Spotlight on Abuses at Iowa Plant*, WORKDAY MINN., July 28, 2008, http://www.workdayminnesota.org/index.php?news_6_3734.

346. David Cole, *The Idea of Humanity: Human Rights and Immigrants’ Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 629 (2006).

347. *Id.* at 627.

348. *Id.* at 627–28.

349. See, e.g., Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

preferable to empower courts to issue only injunctive relief rather than also award money damages.

The first is a practical reason. From a purely practical perspective, it would be unrealistic to assume that the United States' fractured Congress would pass legislation that could potentially drain the limited and shrinking budgets of local, municipal, state, and federal governments. Given that we are in the worst financial straits since the Great Depression and governmental resources are already being stretched to their limits, it seems highly unlikely that any elected official would lend his or her support to a statute that would hold governmental entities liable for money damages. Doing so would put even greater strain on the ability of government to deliver vital services. It is also likely true that the issue of monetary damages in any economic environment could be a heated congressional debate. Because money damages against offenders can be pursued using already-existing statutory and common law avenues, it is not worth stopping in its tracks the passage of much-needed implementing legislation over the issue of money damages.

But, putting aside the current political and economic climate in the United States, injunctive relief is still preferable to money damages for human rights violations. The nature of human rights treaties is such that the actual enforcement of rights has always been superior to money damages. As the United Nations General Assembly states in the preamble of the Universal Declaration of Human Rights:

Now, therefore, The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.³⁵⁰

The goal of human rights treaties is to unite the world's governments to condemn past human rights violations and enforce the rule of law as reflected in a treaty's provisions.³⁵¹ Human rights treaties are contracts between all the State parties who, by ratifying the treaty, affirm their duties to protect individuals within their national borders and respect the rights of those residing outside them.

Moreover, human rights treaties do not typically have damages provisions. Of the four human rights treaties ratified by the United States, only

350. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810, at 72 (Dec. 10, 1948).

351. See, e.g., *id.*

CAT explicitly asks for State parties to provide an appropriate mechanism for monetary damages.³⁵² Article 14 of CAT states:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.³⁵³

But the United States attached a non-self-executing RUD to this Article.³⁵⁴ Because Congress assumed that already-enacted criminal provisions—murder, assault, etc.—met the treaty’s obligations, redress is only available through those legal avenues and money damages are not allowed.³⁵⁵

Countries ratify treaties to both enumerate their obligations to their citizens, and also to ensure that every government that signs the treaty will make every effort to meet its obligations under the treaty. The world’s countries have determined that society as a whole is better off when every country ratifying a treaty ensures that the human rights of its residents are met and vigorously protected. As such, even though human rights treaties protect individuals, they primarily are enacted for the good of the “community” on every level in the local to global continuum.

Anything then that impedes the enforcement of a human rights treaty harms the collective good locally and globally. For example, if the United States fails to lift the non-self-executing provisions contained in human rights treaties it has ratified (for fear that doing so will unleash a flood of money damages actions), it harms both individuals and society as a whole: individuals because they do not have the ability to seek redress for human rights violations, and society because human rights abuses can continue unabated. Currently, individuals whose human rights are violated in the United States have no recourse through treaty law to remedy violations.

352. Convention Against Torture, *supra* note 14, at 116.

353. *Id.*

354. *Id.* at 121–22.

355. In its second periodic report to the Committee Against Torture, the State Department points to how § 1983 has allowed for redress for victims:

Civil actions in state and federal courts. Individuals continue to file civil suits in state and federal courts seeking redress against officials for allegedly violating their rights, which may involve seeking monetary damages or equitable or declaratory relief. One of the most common methods by which prisoners seek redress against state and municipal officials is by means of a civil law suit for violations of fundamental rights pursuant to 42 U.S.C. § 1983.

U.S. DEP’T OF STATE, SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE 25 (2005), available at <http://www.state.gov/documents/organization/62175.pdf>. However, the examples given are cases that would have likely happened under § 1983 without explicit use of the CAT.

Thus, human rights violations go unaddressed because courts are not empowered under the treaty to stop the violations.

Giving courts broad injunctive powers to end human rights violations, however, serves both the purpose of human rights treaties, and also benefits the individual who has initiated the action. Courts can order broad equitable remedies that will not only benefit individuals who initiate human rights litigation, but that will also benefit anyone who is similarly situated to the litigant. This may not make a litigant whole in the same way as monetary damages, and may not explicitly punish the wrongdoer, but it does enforce the rule of law as embodied in the human rights treaties. That, in and of itself, has tremendous merit. It also satisfies the United States' international obligations.

This position is borne out by the European Court of Human Rights (ECHR), a supra-national court established by the European Convention on Human Rights and Fundamental Freedoms (European Convention).³⁵⁶ The ECHR has jurisdiction over forty-seven member states and has largely handled human rights violations by imposing legal obligations on member states to end breaches of the convention.³⁵⁷ Even with a broad jurisdictional mandate,³⁵⁸ the court relies heavily on state parties to implement remedies for their own breaches by issuing declaratory judgments³⁵⁹ and making reparations "in such a way as to restore, as far as possible, the situation existing before the breach (*restitutio in integrum*)."³⁶⁰ In other words, *restitutio in integrum* requires the court to "re-establish the situation which would have existed if the wrongful . . . omission had not taken place, by performance of the obligation which the state failed to discharge."³⁶¹

For abuses of human rights, the ECHR has allowed for certain damages under its Article 41 powers, but in comparison to American tort law, they are relatively small.³⁶² For example, in *Yakovenko v. Ukraine*, an HIV-positive applicant with tuberculosis was detained in a temporary detention center and not provided with any medical treatment for his conditions.³⁶³ Mr. Yakovenko's mother sought 434 euros in pecuniary damages (pertain-

356. *The Court in Brief*, EUR. CT. OF H.R., <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/> (last visited Aug. 24, 2011).

357. *Id.*

358. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, June 1, 2010 C.E.T.S. 194 ("[A]ny person, non-governmental organisation, or group of individuals" may bring an application (a complaint) before the court should they be a victim of a violation by a state party.).

359. Assanidzé v. Georgia, App. No. 71503/01 Eur. Ct. H.R. (2004), <http://www.echr.coe.int>. See Ingrid Nifosi-Sutton, *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective*, 23 HARV. HUM. RTS. J. 51 (2010) (also notes that the ECHR has recently moved away from its conservative approach and interpretation of Article 41).

360. Kevin Boyle, *Council of Europe, OSCE, and European Union*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 143, 158–59 (Hurst Hannum, 4th ed. 2004).

361. FRANCISCO FORREST MARTIN & STEPHEN J. SCHNABLY, INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW: TREATIES, CASES AND ANALYSIS 303 (2006).

362. Nifosi-Sutton, *supra* note 359.

363. *Yakovenko v. Ukraine*, App. No. 15825/06, Eur. Ct. H.R. (2008). See also Nifosi-Sutton, *supra* note 359.

ing to his treatments) and 50,000 euros in non-pecuniary damages.³⁶⁴ The ECHR found that the government's failure to provide medical treatment amounted to inhuman or degrading treatment under the European Convention and awarded the full pecuniary damages, but only 10,000 of the 50,000 euros were awarded as non-pecuniary damages.³⁶⁵

As pointed out by Frederik Sundberg, there are four categorizations of injunctive relief that the ECHR has utilized in demanding state party compliance:

- (1) a change of law by Parliament or by the Government;
- (2) a reopening of the case . . . ;
- (3) acceptance by courts and administrative authorities of the precedent value of the Court's judgment . . . ; [and]
- (4) pardon, amnesty or abolition.³⁶⁶

Notably, these injunctive powers are more like declaratory relief³⁶⁷ because of the shared responsibilities between the ECHR and the Committee of Ministers outlined in the European Convention.

Because the ECHR has interpreted its Article 53 powers narrowly, the ECHR allows the respondent state party to determine what means it should use to comply with a particular ECHR judgment.³⁶⁸ The ECHR has repeatedly declined to assert jurisdiction to order state parties to "implement specific measures of reparation or to change its law or practice in any particular way so as to prevent similar violations from recurring in the future."³⁶⁹ The court has recently shown a willingness to allow the Committee of Ministers, the Council of Europe's decision-making body, to interpret decisions and pressure state parties to comply.³⁷⁰ Thus, the court relies heavily on external politicking in order to achieve redress for continued violations of the European Convention.

Even though the Inter-American Court of Human Rights (IAC) takes a more aggressive stance and orders specific measures such as restitution, it still shies away from awarding large money damages.³⁷¹ The IAC vigorously employs restitution, compensation, rehabilitation, satisfaction, and takes steps to guarantee non-repetition of human rights violations.³⁷² Although the

364. *Yakovenko*, App. No. 15825/06, Eur. Ct. H.R.

365. *Id.*

366. Fredrik G.E. Sundberg, *The European Experience of Human Rights Proceedings: The Precedent Value of the European Court's Decisions*, 20 AKRON L. REV. 629, 634 (1987).

367. See MARTIN & SCHNABLY, *supra* note 361.

368. THE REDRESS TRUST, ENFORCEMENT OF AWARDS FOR VICTIMS OF TORTURE AND OTHER INTERNATIONAL CRIMES 78 (May 2006), available at http://www.redress.org/downloads/publications/master_enforcement%2030%20May%202006.pdf.

369. *Id.* at 26.

370. *Id.* at 25.

371. Judith Schönsteiner, *Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights*, 23 AM. U. INT'L L. REV. 127, 136 (2007).

372. Non-repetition measures focus on the goal of benefiting society as a whole and serving a collec-

IAC awarded monetary remedies in two of its early seminal cases *Velasques-Rodriguez* and *Godinez-Cruz*, it has since developed a foundation of non-monetary measures by issuing far-ranging equitable remedies.³⁷³

The IAC provides for a broad array of equitable remedies. IAC cases show the continued use of reparations in the form of non-monetary measures to satisfy human rights violations. The broad language in Article 63(1) of the American Convention on Human Rights (ACHR) authorizes the IAC to provide remedies pursuant to a State's general obligations under the Convention:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.³⁷⁴

IAC decisions, as described by both its own judges and international human rights scholars, are more appropriately described as dissuasive rather than punitive.³⁷⁵ For example, in the 1999 case *Castillo-Petruzzi v. Peru*, the Court held that “domestic laws that place civilians under the jurisdiction of the military courts are a violation of the principles of the American Conven-

tion good, which is the core of most international human rights treaties. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 25 (Nov. 19, 2004) (citing the “Reasoned Vote of Judge Cancado Trindade”) (arguing that one of the purposes of reparations is to guarantee the harmful acts will not be repeated). These societal-directed remedies arguably indicate the Court's attempt to prevent recurrence of violations through fair investigation, prosecution, and state apology and responsibility. Non-repetition is a remedy which can be manifested through legislative changes and reform, or “developmental remedies,” such as mandating training for state officials and ordering funds for health and housing be established for collective communities whose land has been seized. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 382–86 (2008); see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 19–23, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (Restitution comprehends restoring the victim to his or her original situation. Rehabilitation includes “medical and psychological care as well as legal and social services.” Satisfaction comprises a variety of possible measures: apologies, “full and public disclosure of the truth,” victim memorials, judicial and administrative sanctions against the responsible parties. Guarantees of non-repetition include establishment of human rights educational and training programs.).

373. Antkowiak, *supra* note 372, at 365 (describing that in *Velásquez-Rodriguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989), and *Godínez-Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989), the IAC only awarded compensation for the deaths and “ruled that the State had a continuing duty—as long as the ‘fate’ of the disappeared was not known—to investigate the forced disappearances, as well as ‘to prevent involuntary disappearances and to punish those directly responsible.’”).

374. Organization of American States, American Convention on Human Rights arts. 1(1)-(2), 63(1), Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123, 159.

375. Schönsteiner, *supra* note 371 (describing *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 164 (Nov. 27, 1998), which required Peru to amend domestic laws to conform with the ACHR); *Plan de Sánchez Massacre*, 2004 Inter-Am. Ct. H.R. (ser. C) at ¶ 25 (citing the “Reasoned Vote of Judge Cancado Trindade” and arguing that one of the purposes of reparations is to guarantee the harmful acts will not be repeated).

tion,” and consequently ordered Peru “to adopt the appropriate measures to amend those laws.”³⁷⁶ Peru was also directed to change its criminal and anti-terrorism laws through non-pecuniary measures in the *Loayza-Tamayo* case.³⁷⁷ Remedies instructing states to change legislation serve the collective good and are a basic tenet of complying with international human rights treaties.

Moreover, these non-monetary remedies also offer an important form of redress to victims: providing them with agency, and acknowledging that their dignity and basic rights were violated.³⁷⁸ For example, the IAC has ordered Mexico to restore the integrity or identity of a victim by exhuming remains, investigating disappearances, and locating children who were separated from their parents.³⁷⁹ Victims’ families have been given agency through their ability to oversee the investigations, and the capacity to work with the IAC to ensure compliance with reparations orders.³⁸⁰

Other non-monetary reparations that have been routinely ordered by the IAC include publishing judgments in national newspapers,³⁸¹ providing medical and psychological treatment to the victims and their next of kin,³⁸² creating a genetic information system to identify murdered individuals,³⁸³ and even translating the American Convention on Human Rights into the native language of victims.³⁸⁴ In cases involving violations against indigenous groups, the IAC has generally refrained from awarding individual dam-

376. *Castillo-Petruzzi v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 222 (May 30, 1999).

377. *MERA MARTINOT ET AL., AMSTERDAM INT’L L. CLINIC, THE COMPETENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS TO ORDER RESTITUTIO IN INTEGRUM AND SPECIFIC ORDERS AS REMEDIAL MEASURES IN THE CASE 46221/99* 1, 33 (2000), available at [http://www1.jur.uva.nl/ailc/ Restitutio%20in%20integrum%20and%20the%20ECHR.pdf](http://www1.jur.uva.nl/ailc/Restitutio%20in%20integrum%20and%20the%20ECHR.pdf) (describing the IAC’s requirements that the state: provide the victim with teaching opportunities in a public institution which offered the same benefits as the sum of the teaching jobs she held at the time of her detention, reinstate the same pension and retirement rights and benefits to which she was entitled prior to the detention, and adopt all domestic legal measures to render her previous flawed conviction null and void).

378. William Paul Simmons, *Remedies for the Women of Ciudad Juárez through the Inter-American Court of Human Rights*, 4 NW. U. J. INT’L HUM. RTS. 493, 504 (2006).

379. *Id.*

380. *Id.*

381. *See, e.g., Bamaca-Velasquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 84 (Feb. 22, 2002); *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 278, 280 (Nov. 25, 2003).

382. *See, e.g., 19 Merchants v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 278 (July 5, 2004) (“[T]he State has the obligation to provide without charge . . . the medical and psychological treatment required by the next of kin of the victims”); *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶¶ 198-200 (Mar. 1, 2005) (ordering the State to provide free medical and psychological treatment to the victims, if they are found, and to their next of kin); *Goiburú et al v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 176 (Sept. 22, 2006) (ordering physical and psychological treatment to the next of kin).

383. *See, e.g., Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 193 (Mar. 1, 2005) (“[T]he State must . . . create a system of genetic information that allows genetic data that can contribute to determining and clarifying the relationships and identification of the disappeared children and their next of kin to be obtained and conserved.”).

384. *See, e.g., Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 102 (Nov. 19, 2004) (“[T]he State must translate the American Convention on Human Rights into the Maya-Achí language”).

ages and has opted to order the offending State to establish community development funds to benefit entire communities.³⁸⁵

In the *Myrna Mack Chang* case, the IAC found that “Guatemala had violated the right to life, right to a fair trial, and right to humane treatment in the assassination of Chang, an anthropologist and human rights activist.”³⁸⁶ “Guatemala accepted unconditional responsibility for the killing” and “the State was ordered to investigate the case, prosecute and punish the perpetrators, and publish the results of any investigation.”³⁸⁷ In keeping with its practice of awarding non-monetary reparations, the IAC also ordered the State to “establish a scholarship”³⁸⁸ and “name a well-known street or square in Guatemala City” in honor of Chang.³⁸⁹ What is unusual about this case is that the court also ordered the State to pay approximately \$750,000 in damages and expenses to be divided amongst Chang’s eight surviving family members.³⁹⁰

While the IAC mixes compensatory and equitable remedies, forward looking non-monetary measures and relief that redresses human rights violations hold perpetrators accountable and restore the victim’s rights.³⁹¹ The IAC issues equitable remedies as the foundation and first course of action for relief while moving away from monetary ones.³⁹² “Constantly faced with a wide spectrum of human rights violations, the Inter-American Court has generally chosen to emphasize equitable remedies, to be supplemented whenever possible with meaningful compensation.”³⁹³ Consequently, IAC jurisprudence makes “a convincing case that other courts and institutions should employ non-monetary remedies to a far greater extent.”³⁹⁴

It goes without saying that to comply with judicial orders to end human rights abuses, governments will most likely need to expend resources, and

385. See, e.g., *Mayagna Awas Tingni Community v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 167 (Aug. 31, 2001) (ordering the State to invest \$50,000 in the Community); *Moiwana Community v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 214 (June 15, 2005) (ordering Suriname to establish a developmental fund in the amount of \$1.2 million); *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 205 (June 17, 2005) (ordering the State to create a development fund in the amount of \$950,000); *Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 224 (Mar. 29, 2006) (ordering the State to create a community development fund in the amount of \$1,000,000).

386. Simmons, *supra* note 378, at 504–05; *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301 (Nov. 25, 2003).

387. Simmons, *supra* note 378, at 505.

388. *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 285 (Nov. 25, 2003).

389. *Id.* at ¶ 286. These types of reparations are not uncommon in IAC judgments. In the *Case of the Street Children*, the court ordered Guatemala to dedicate an educational center in memory of the five adolescents who were tortured and killed by Guatemalan security agents. 2001 Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 103 (May 26, 2001). In *Serrano-Cruz Sisters v. El Salvador*, the court ordered the State to dedicate a day to children who disappeared during conflict. 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 196 (Mar. 1, 2005).

390. Simmons, *supra* note 378. In reviewing recent IAC decisions, the Court has demonstrated non-monetary remedies in all possible circumstances, no matter the size of the case, number of victims, or type of human rights violations alleged.

391. Schönsteiner, *supra* note 371.

392. Schönsteiner, *supra* note 371.

393. Antkowiak, *supra* note 372, at 418.

394. *Id.*

in many cases significant resources. Money spent to comply with our international obligations, however, would be expended for the greater public good and not for the sole benefit of one person. Moreover, as human rights scholars and advocates and the Executive branch have articulated, it is better for U.S. foreign policy if the United States is seen as respecting and enforcing human rights.³⁹⁵

CONCLUSION

In order for the United States to fulfill its obligations to its people and to the world, the United States has to abide by the conditions of the human rights treaties that it has ratified. It can only do so if it allows victims to seek remedies for human rights violations in our courts. As this paper discusses, the best way to provide a remedy for human rights treaty violations is not just by lifting non-self-executing RUDS that make treaties unenforceable. That is only the first step. It is also necessary to enact a universally-applicable implementation statute—akin to, but different from, 42 U.S.C. § 1983—that would give federal district courts jurisdiction to hear claims brought under treaties.

Although arguably § 1983 can be used as implementing legislation, it is a very inefficient avenue for enforcing human rights treaties. The way § 1983 has been interpreted would limit the scope of relief because federal courts have incorporated common law immunities and procedural perks for defendants into that statute. And because treaties are products of intense negotiations, many may not pass the textual scrutiny necessary for a successful § 1983 claim.

In this paper I propose universal implementing legislation and discuss why this legislation that would apply to all treaties is superior to having Congress enact specialized implementing legislation for each human rights treaty that is ratified. The implementing legislation proposed in this paper is a necessary step in integrating this country's international human rights treaty obligations into the U.S. legal framework. The proposed legislation provides a clear path for strengthening the rule of law by fulfilling the United States' treaty obligations both under the Constitution and the treaties it

395. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at www.state.gov/s/l/releases/remarks/139119.htm). Commentators believe that President Obama was awarded the Nobel Peace Prize in 2010 precisely because of his willingness to reintegrate the United States into the global community, and because of his emphasis on human rights. Press Release, Norwegian Nobel Committee, The Nobel Peace Prize for 2009, (Oct. 9, 2009), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/2009/press.html ("Obama has as President created a new climate in international politics. Multilateral diplomacy has regained a central position, with emphasis on the role that the United Nations and other international institutions can play. Dialogue and negotiations are preferred as instruments for resolving even the most difficult international conflicts. The vision of a world free from nuclear arms has powerfully stimulated disarmament and arms control negotiations. Thanks to Obama's initiative, the USA is now playing a more constructive role in meeting the great climatic challenges the world is confronting. Democracy and human rights are to be strengthened.").

has ratified. It also provides a means and effective mechanism to stop human rights abuses that occur within the United States, in a way that will benefit society as a whole.