A Short Primer on U.S. federalism and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), prepared at the request of the US Human Rights Network

By the Society of American Law Teachers[1]

General

From the perspective of international law, the United States, like any other State, is bound as a nation when it ratifies treaties, and is subject to customary international law and "general principles of law recognized by civilized nations."[2]

These international law obligations bind the United States, whatever its internal governing structure.[3] However, the United States has repeatedly asserted, both on the international plane as a political-legal position and as a matter of domestic law, that these international obligations are subsidiary to other United States law (that is, federal law, and at least by some state authorities, state law). Moreover, frequently these international obligations are effectively ignored entirely, even when the U.S. concedes that it is violating international law in doing so. The U.S. approach to international law might be termed the "United States foreign relations law vision." This vision is in sharp contrast to the positions of the vast majority of developed democracies with respect to the legal force of international law on their countries and their domestic legal systems.

This U.S. foreign relations law vision permeates the United States statements to the United Nations Committee on the Elimination of Racial Discrimination (CERD) and about the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The difference between most countries' view of the legal effect of international law and the U.S. foreign relations law vision affects the dialogue of the CERD with the United States, and should inform both understanding of the U.S. presentation, and, in turn, analysis of the United States compliance with its international law obligations.

Federalism in the United States

A further complexity is that the assignment of what international law would term the jurisdiction to prescribe, enforce and adjudicate inherent in any State is done in the United States through a constitutional structure of federalism (a federal government that is sovereign, and state governments of 50 states that are also sovereign) and separation of powers (a federal government made up of the branches of the Presidency, Congress, and the Judiciary and each of the structures of government of the 50 states).

The idea behind this constitutional structure was to provide a double security to the rights of the people. As was described by one of the key framers of the Constitution:

---

[1] For more than forty years, the Society of American Law Teachers (SALT) has been one of the largest membership organizations for teachers of law in the United States. SALT has a three-part mission: 1) creating and maintaining a community of progressive and caring law professors dedicated to making a difference through the power of law; 2) promoting the use of many forms and innovative styles of teaching to make our classrooms more inclusive; and 3) challenging faculty and students to develop legal institutions with greater equality, justice, and excellence.

[2] Article 38 Statute of the International Court of Justice definition of international law.

[3] Section 111 and Comment (a), Restatement of the Law Third, the Foreign Relations Law of the United States (American Law Institute May 14, 1986).

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[4]

International law in the United States

International law is incorporated in U.S. domestic law in complex ways. International treaties and, traditionally, customary international law and general principles as U.S. federal law are supreme over the law of the states.[5] For treaties, the Constitution makes it crystal clear that they are part of the "supreme law" of the land, although a Supreme Court opinion early in the U.S. history created the doctrine of "non-self-executing" treaties,[6] which requires Congressional action in order for "non-self-executing treaties" to become law. A self-executing treaty is a treaty that becomes enforceable in U.S. courts upon ratification. This contrasts with a non-self-executing treaty, which becomes enforceable in U.S. courts through the implementation of legislation following ratification. Thus, the U.S. evolved from a system where international law was part and parcel of domestic U.S. law (that is, what is termed a "monist" system) into a "hybrid" system, which incorporates elements of a monist and a dualist system (that is, a dualist system means international law is incorporated into domestic law through domestic implementing legislation). This being said, the U.S. government has progressively leaned toward the "dualist" system, and the U.S. now much more resembles the British form of a dualist approach to international law than the original monist approach provided in the text of the Constitution. There exists considerable uncertainty whether a particular treaty is "self-executing" or not, with almost no human rights treaties considered "self-executing." There is significant uncertainty as to whether any given treaty is or is not self-executing, until the Supreme Court determines the status of the treaty on a case by case basis.[7] If a treaty is considered non-self-executing, domestic implementation is the task of Congress.[8] The United States frequently argues, often opportunistically, as it has with the ICERD, that the treaty is both non-self-executing and that there is no need for implementing legislation because the Constitution, the laws of the United States, and possibly the 50 states sufficiently implement the treaty obligation. Similarly, in the case of the International Covenant on Civil and Political Rights, this U.S. position has simply been a reason for avoiding domestic implementation of the treaty obligations.

The place of customary international law and general principles in U.S. domestic law depends to some extent on whether there is a treaty or a controlling executive or legislative act or judicial decision that contravenes the customary international norm or general principle of international law.[9] If a treaty or

[4] Wednesday, February 6, 1788, James Madison, Federalist Paper 51 available at http://www.constitution.org/fed/federa51.htm.

[5] Section 111(1), Restatement of the Law Third, the Foreign Relations Law of the United States, (American Law Institute 1986) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several states."). Some scholars argue that customary international law and general principles are state law. Jack L. Goldsmith & Curtis Bradley, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

[6] Foster & Elam v. Neilson, 27 U.S. 253 (1829).

[7] Medellin v. Texas, 552 U.S. 491 (2008), has increased the uncertainty.

[8] Id.

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

other international obligation conflicts with substantive rights expressed in the Bill of Rights of the U.S. Constitution, that international obligation will be given no effect as a matter of U.S. domestic law. [10]

Inconsistency of International Law or Agreement and Domestic Law: Law of the United States

As detailed in the 3rd Restatement of Foreign Relations Law at Section 115, the U.S. approach to inconsistency of international law or agreement and domestic law is:

> (1) (a) An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States 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.
>
> (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.
>
> 2) A provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States.

[10] Cf. Missouri v. Holland 252 U.S. 416 (1920) and the subsequent case Reid v. Covert 354 U.S. 1 (1957). This year, a majority of the Supreme Court somewhat skirted the issue of whether structural grants of power between the U.S. federal and state governments act as limits on the treaty making power and legislative power of the federal government. This case involved the interpretation of the effect of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. S. Treaty Doc. No. 103–21, 1974 U. N. T. S. 317. The Court held this treaty is a non-self-executing treaty with (unlike the ICERD) implementing legislation through the Chemical Weapons Convention Implementation Act. See 112 Stat. 2681–856. Under the principle that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case, the Court concluded that the relevant section of the implementing legislation which tracks the treaty language should be read narrowly. Absent a clear statement of that purpose, the Court stated it would not presume Congress to have authorized reaching the conduct of the individual in question. A majority of the Court would view such reach of an implementing statute as a stark intrusion by the federal government into traditional state police power authority. The Court noted that if the statute reached the conduct in question, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Bond v. United States, Opinion of the Court 572 U. S. ____ (June 2, 2014). This line of reasoning trims the force of Missouri v. Holland by raising structural federalism concerns about the reach of implementing legislation that tracks language of a treaty entered into under the authority of the United States. Of even greater concern, three justices who concurred in the result of the majority expressed views that the federal treaty power did not reach "internal domestic matters" of the kind that are at the heart of human rights treaties such as the ICERD, a conclusion that is at odds with prevailing interpretation of constitutional treaty-making power. See Bond v. United States 572 U. S. ____ (June 2, 2014), (concurrences of Justice Scalia, Justice Thomas and Justice Alito). The implication could not be clearer. This recent decision indicates a further destabilizing of U.S. domestic implementation of international law to avoid treaty obligations. In addition to existing federalism challenges to implementing legislation of non-self-executing treaties and to rare self-executing treaties, the *Bond* decision threatens a narrowing vision of the treaty power of the federal government that excludes undertaking treaties concerning internal domestic matters (including human rights treaties). It is therefore evident that a destabilizing of the domestic consequences of U.S. ratification of human rights treaties is ongoing.

(3) A rule of international law or a provision of an international agreement of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution.[11]

This particular United States foreign relations law vision is all the more perplexing since the Supreme Court had decided, early in the country's history, that domestic courts should make every possible effort to reconcile domestic and international law. As recently noted by the U.S. Department of State Legal Advisor:

> "Most famously, the Supreme Court has long held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'' Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (the "Charming Betsy doctrine"). In the area of treaty interpretation, the Supreme Court has long noted that it is "bound to observe [treaties] with the most scrupulous good faith.'' The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 68 (1821); see also Chew Heong v. United States, 112 U.S. 536, 540 (1884) ("Treaties of every kind ... are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.'') (internal quotation marks omitted). The Court has also repeatedly reaffirmed that it gives "considerable weight" in interpreting treaties to the "opinions of our sister signatories." Abbott v. Abbott, 130 S. Ct. 1983, 1993 (20 1 0).[12]

Nonetheless, this binding precedent is insufficiently invoked by U.S. domestic courts.

International law in domestic law: federalism.

As noted in the U.S. reservations, understandings and declarations to the ICERD, in addition to stating the treaty being non-self-executing (with implications in internal law described above) the United States states:

> "[T]he United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention."[13]

The federal government is a government of limited jurisdiction with federal law (the Constitution, federal laws and treaties and, traditionally, customary international law and general principles[14]) being the supreme law of the land, while each of the states is considered a government of general jurisdiction. U.S. state responses to international law can best be described as divergent, with some state courts taking non-self-executing treaties into account out of an abundance of caution, and pursuant to the *Charming Betsy* doctrine discussed *supra*, as they are obligations dictated by the Constitution's

[11] Section 115, Restatement of the Law Third, the Foreign Relations Law of the United States (American Law Institute 1986).
[12] Pg. 11, Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict, January 21, 2013.
[13] Section II, United States Reservations, Understandings and Declarations to the ICERD, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec
[14] Customary international law and general principles are sometimes argued in academic circles to be state law.

Supremacy Clause.[15] Other states do not consider themselves bound by non-self-executing treaties or International Court of Justice decisions in the absence of implementing legislation.[16] Some states have attempted to ban the application of international law (viewed as foreign law) in their courts, finding such actions (incorrectly) to be irrelevant to interpretation of U.S. law.[17]

Conclusion.

The United States has undertaken obligations in international law in the form of treaties, customary international law, and general principles. How those international law obligations become part of U.S. domestic law is complex. Divergent reactions to international law by U.S. courts as a result of the particular U.S. foreign relations law vision are rampant at the state and federal level. The current political climate has made U.S. respect for international law even more contested. Whereas there is no doubt that the United States remains subject to specific international law obligations such as the ICERD, its willingness, or ability, to implement those obligations remains uncertain.

[15] Oklahoma, See Concurrence of Judge Charles S. Chapel, Torres v. Oklahoma No. PCD-04-442 (Okla. Crim. App. May 13, 2004).

[16] Texas, see Medellin v. Texas 552 U.S. 491 (2008), Virginia Governor's statement of April 14, 1998 in the Angel Breard case subsequent to Breard v. Greene, The Republic of Paraguay v. Gilmore 523 U.S. 371 (1998)

[17] Ryan H. Boyer, Student Note, *"Unveiling" Kansas's Ban on Application of Foreign Law,* 61 Kansas L. Rev. 1061 (2013).