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DEFENSIVELY INVOKING TREATIES IN AMERICAN COURTS—JURISDICTIONAL CHALLENGES UNDER THE U.N. DRUG TRAFFICKING CONVENTION BY FOREIGN DEFENDANTS KIDNAPPED ABROAD BY U.S. AGENTS

THOMAS MICHAEL McDONNELL*

I. INTRODUCTION

Article VI of the United States Constitution makes treaties “the supreme Law of the Land.”¹ Through this clause, the Framers intended, among other things, to grant foreigners the right to invoke treaties in American courts.² The Framers thereby hoped to avoid conflicts with a foreigner’s home country.³ The potential for such conflict rises when our government, rather than a private party, deprives a foreigner of a right protected by treaty.⁴ Individuals—citizens and foreigners alike—attempting

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1. Article VI states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (commonly referred to as the “Supremacy Clause”).

Article III of the Constitution provides that the judicial power “extend[s] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2, cl. 1. The Judiciary Act of 1789, the first legislation the Senate considered, gave federal courts jurisdiction over disputes involving treaties. 1 Stat. 73 (1789).

2. THE FEDERALIST No. 80 (Alexander Hamilton); *see also infra* notes 70-74 and accompanying text.

3. *Id.* The Framers also hoped to preserve the rule of law and to protect the rights of the individual. *See infra* part II.A.2.a.

4. Note, for example, the outrage Mexicans at all levels of society expressed when the United States Supreme Court in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), reversed a decision ordering the return of a Mexican physician

to invoke treaties in American courts have, however, often been blocked by the judicially created non-self-executing treaty doctrine, under which the courts refuse to enforce certain treaties or treaty provisions. Lower federal courts, in particular, have unjustifiably expanded the doctrine and frequently have applied the wrong standard.⁵ They have thus often frustrated the Framers' purpose, violated the plain meaning of the Supremacy Clause, and failed to protect individuals' human rights.

This Article unravels the non-self-executing treaty doctrine, examines the invocation of a treaty as a defense to governmental action, and develops a test for when an individual (rather than a government) may assert a treaty defensively in state or federal courts. Lastly, this Article applies this test to state-sponsored kidnapping and the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁶ The parties to

whom Drug Enforcement Administration-paid agents had kidnapped from Mexico and brought to the United States for trial. See *infra* notes 454, 457 and accompanying text.

5. See *United States v. Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989) (determining that the U.N. Protocol Relating to the Status of Refugees is non-self-executing and thus not invocable by sanctuary movement members defending against federal prosecution for smuggling Central American immigrants claimed to be refugees), *cert. denied*, 498 U.S. 1046 (1991); *United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987) (concluding that the High Seas Convention is non-self-executing); *United States v. Postal*, 589 F.2d 862, 873-84 (5th Cir.) (same), *cert. denied*, 444 U.S. 832 (1979); *See Fujii v. State*, 217 P.2d 481 (Cal. Dist. Ct. App.), *reh'g denied*, 218 P.2d 595 (Cal. Dist. Ct. App. 1950), *rev'd on this issue and aff'd on other grounds*, 242 P.2d 617, 620-22 (Cal. 1952) (en banc) (determining that Articles 55 and 56 of the U.N. Charter, the human rights articles, are non-self-executing and thus not invocable by a Japanese immigrant challenging race-based restriction on owning land); *In re Medina*, 19 I. & M. Dec. 734, 734-35, 740-41 (1988) (determining that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War is non-self-executing and thus not invocable by a Salvadoran fighting deportation to her country in the middle of an armed conflict); see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that, among other treaties, the Geneva Convention for the Protection of Civilian Persons in Time of War and the Geneva Convention Relative to the Treatment of Prisoners of War are non-self-executing), *cert. denied*, 470 U.S. 1003 (1985); Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980) (criticizing the Fifth Circuit's decision in *United States v. Postal*).

6. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature Dec. 20, 1988, U.N. Doc. E/CONF.82/15 (1988), reprinted in 28 I.L.M. 493 (1989) (entered into force Nov. 11, 1990) [hereinafter U.N. Drug Trafficking Convention].

this treaty, which was sponsored by the United States, barred one country's law enforcement agents from operating without permission on another country's soil and rejected a provision requiring a country to extradite its own citizens.⁷ This Article demonstrates that, had the Convention been in effect when the Supreme Court decided *United States v. Alvarez-Machain*,⁸ the Court would have been constrained, even under its flawed reasoning in interpreting the extradition treaty at issue there, to have recognized the challenge to the trial court's personal jurisdiction brought by the Mexican physician abducted from Guadalajara by paid agents of the United States.⁹

To understand why courts generally should permit individuals, and particularly foreigners, to invoke treaties defensively requires an examination of the status of treaties in American law and, especially, a study of Article VI, clause 2, of the Constitution. Part II analyzes the text and drafting history of the Supremacy Clause, the characteristics of self-executing and non-self-executing treaties, the United States' approaches to treaty interpretation, and the manner in which American courts have interpreted treaties when asserted defensively by individuals. Part III proposes a three-prong test for invoking treaties defensively. Part IV analyzes the U.N. Drug Trafficking Convention, discusses the extraordinary drafting history of the Convention's extradition and antforeign law enforcement articles, and shows how they ought to be interpreted in light of that history and in accordance with the more general rules of treaty interpretation discussed in Part II. After analyzing these provisions, Part IV demonstrates how the general theory of treaty interpretation and the proposed test combine to accord abducted foreign defendants¹⁰ the right to invoke these two articles to challenge the

7. *Id.* arts. 2, 6; see *infra* note 318 (excerpting relevant paragraphs of Article 6); Appendix, *infra*, at notes 525-32 (providing complete text of Article 2).

8. 504 U.S. 655 (1992).

9. See *infra* part IV.C.1.

10. The Convention deals solely with illicit drug trafficking and protects only those kidnapped in relation to law enforcement efforts involving illicit drugs. Furthermore, the Convention protects nationals of the state from which the individual is abducted, not necessarily nationals of other states. This fact does not mean that those outside the Convention have no protection. Customary international law and human rights treaties generally prohibit state-sponsored abductions. See RESTATEMENT (THIRD) OF

personal jurisdiction of state and federal courts.

II. TREATIES IN AMERICAN COURTS

A. *Treaties and the Supremacy Clause*

1. *Self- or Non-Self-Executing?*²—A Question of Domestic Law

In their relations with one another, most countries view treaties as legal obligations, much in the same way that parties to a private bilateral or multilateral contract regard such an agreement.¹¹ The domestic courts of nation states, however, view treaties through a different lens—that of their domestic law, including applicable constitutional provisions. The lens may consist of transparent glass, highly refracted glass, or glass so opaque as to transmit virtually no light whatsoever. Whether an

FOREIGN RELATIONS § 432 reporter's note 1 (1987) (inferring from Articles 3, 5, and 9 of the Universal Declaration of Human Rights, as well as Articles 7, 9, and 10 of the International Covenant on Civil and Political Rights, that state-sponsored abductions are illegal and noting that the Human Rights Committee established by the Covenant on Civil and Political Rights declared that Uruguayan security agents violated Article 9(1) by kidnapping a Uruguayan refugee from Argentina).

The United States Senate, however, has rendered the human rights treaties that the United States has ratified largely non-self-executing. *See, e.g.*, 138 CONG. REC. S4781, S4783 (daily ed. Apr. 2, 1992) (Executive Session on the International Covenant on Civil and Political Rights). Furthermore, American courts have been inconsistent in giving effect to customary international law. *Compare* *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law. [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.") *with* *United States v. Alvarez-Machain*, 971 F.2d 310 (9th Cir. 1992) (concluding that customary international law applies in state-sponsored kidnapping cases only "in a situation in which the government's conduct was outrageous" and thus violative of due process) (citing *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974)); *see also* Louis Henkin, *International Law As Law in the United States*, 82 MICH. L. REV. 1555, 1565-66 (1984) (concluding that customary international law has the same status as self-executing treaties); Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT'L L. 757 (1992) (arguing that the executive branch exceeds its discretion when ordering an extraterritorial arrest without the consent of the territorial sovereign state). *But see* Jack M. Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 151 (1984) (asserting that customary international law is inferior to federal statute).

11. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS pt. 1, ch. 1, introductory note.

individual may invoke a treaty in a domestic court thus depends largely on the domestic law of the country in question. When, without additional implementing legislation, domestic law permits courts to use a treaty provision as the rule of decision, the treaty provision is "self-executing."¹² When domestic law requires implementing legislation to make the provision effective locally, the treaty provision is "non-self-executing."¹³ Whether a treaty provision is self-executing or non-self-executing is a question of domestic, not international, law.¹⁴ Each country is required to carry out its international obligations, but the country may choose any reasonable method of doing so.¹⁵

For example, a clause in a bilateral treaty of amity and friendship may state as follows: "The parties to this treaty guarantee that neither party's nationals shall be subject to discrimination in trade or employment."¹⁶ Assume that two countries, Atlantis and Utopia, enter into a treaty of amity and friendship containing this clause. Assume further that a municipality in Atlantis denied A, a national of Utopia legally residing in Atlantis, a license to operate a taxi cab service. A met all of the municipality's requirements for the license but was denied solely because she was not an Atlantis national. The domestic law of Atlantis could permit A to assert the treaty of friendship in Atlantis's courts to obtain an order, requiring the municipality to issue the license. Alternatively, Atlantis's executive could intervene with the municipality's officials to rescind the denial of

12. *Id.* § 111 cmt. h.

13. *Id.*

14. Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 650 (1986); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 cmt. h; RICHARD B. LILICH & FRANK C. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 73-74 (1979).

15. See Iwasawa, *supra* note 14, at 651 ("States determine how to implement their international legal obligations on the municipal level."). Despite courts' statements that intent of the parties determines the self-executing question, "[t]he negotiating parties are usually not concerned with the question of whether the treaty will be domestically valid or directly applicable [self-executing]." *Id.* at 654. This is particularly so with multilateral treaties. *Id.*, FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 580 (1990).

16. See *Asakura v. Seattle*, 265 U.S. 332, 340 (1924). In *Asakura*, the Court interpreted a similar treaty provision to bar discrimination against a Japanese national carrying out the trade of a pawnbroker. *Id.* at 343.

the license and obtain a license for A.¹⁷ Under either approach, Atlantis has fulfilled its obligations under the treaty of amity and friendship.

The first approach illustrates the operation of a self-executing treaty provision. The second approach illustrates the operation of a non-self-executing provision, an approach that requires implementing legislation to permit the individual to assert the treaty violation in the state's courts. Usually, the state parties do not care which method the other state party or parties adopt to fulfill their treaty obligations.¹⁸ In our country, the available evidence suggests that the Framers of the Constitution intended that the United States adopt the first approach, creating a de facto rebuttable presumption in favor of self-execution.

2. The Framers' Intent in Making Treaties the Law of the Land

Through the Supremacy Clause,¹⁹ the Framers deliberately chose to make treaties law rather than merely a moral obligation.²⁰ They were well aware that England used a quite different

17. Typically, A, the aggrieved national, would have to persuade her government to intercede on her behalf. Assuming that Utopia agreed to do so, it would use diplomatic channels to persuade Atlantis officials to ensure that the municipal government grants A the license. See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 314-15 (1986) (explaining the terms "dualist" and "monist"). Persons within a monist state can invoke the treaty and sue in a domestic court of the state to require that they be treated in accordance with the treaty standard. *Id.* at 314. "In a dualist state, [however,] international treaties are part of a separate legal system from that of the domestic law (hence a 'dual' system)." *Id.* "Therefore, a treaty is not part of the domestic law, at least not directly." *Id.* Persons in such a state may not go to court to enforce their rights under the treaty: "The [foreign citizen's] only recourse is to persuade his own government to use diplomatic means to encourage [the violating state] to honor its obligation[s] under the treaty." *Id.* at 314-15. I have borrowed from Jackson in creating the above hypothetical; he uses a quite similar one to illustrate the difference between a monist and a dualist state.

18. As a matter of convention, the states leave to each party state's domestic law the authority to choose the appropriate means of meeting treaty obligations. See *supra* note 14.

19. See *supra* note 1.

20. George Mason, delegate from Virginia, was one of the three Framers who refused to sign the proposed Constitution. He set forth his objections in a pamphlet that was later published in the *Virginia Journal* on November 22, 1787. George

system and purposely rejected England's approach. Under the British system, treaties are never self-executing,²¹ and Parliament must pass special legislation for a treaty to operate domestically. The Framers, however, wanted treaties to have the same status as do federal statutes.

a. Treaties Becoming Law of the Land

After the hostilities between the British and the rebellious former colonists ended in 1781, intense anti-Tory feeling continued to grip the newly independent American states. As a result, many state legislatures enacted statutes that permitted: (1) forgiveness of debts owed to Tories (British citizens),²² (2)

Mason, *Objections to the Constitution*, VA. J., Nov. 22, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 345 (Bernard Bailyn ed., 1993) [hereinafter THE DEBATE]. A federalist writing under the pseudonym of Civis Rusticus replied as follows: "The infraction of the present treaty [the Treaty of Peace with Great Britain] shews the necessity of treaties having the force of laws. " Civis Rusticus, *Reply to Mason's Objections*, VA. INDEP. CHRON., Jan. 30, 1788, reprinted in 1 THE DEBATE, supra, at 359. Many of the essays, including *The Federalist Papers*, written either for or against ratifying the Constitution, were written under pseudonyms.

21. 3 JONATHAN ELLIOT'S DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 437 (James McClellan & M.E. Bradford eds., 1989) [hereinafter ELLIOT'S DEBATES] (statement of delegate Mercer indicating that treaties in England were never final until voted upon by Parliament). The Minority Report from the Pennsylvania Convention argued that the full Parliament had to approve treaties for them to have effect locally: "It is the unvaried usage of all free states, whenever treaties interfere with the positive laws of the land, to make the intervention of the legislature necessary to give them operation. This became necessary, and was afforded by the parliament of Great-Britain." *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET DAILY ADVERTISER, Dec. 18, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 145, 161 (Herbert J. Storing ed., 1981). As indicated, although Mercer and the minority report correctly noted the English practice, their argument did not prevail. See *Essays of an Old Whig III*, INDEP. GAZETTEER (PHILA.), Oct. 1787-Feb. 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, supra, at 27. In objecting to the Supremacy Clause, the author noted that

even in England the parliament is constantly applied to for their sanction to every treaty which tends to introduce an innovation or the slightest alteration in the laws in being, the law there is not altered by the treaty itself; but by an act of parliament which confirms the treaty, and alters the law so as to accommodate it to the treaty.

Id. Again, although the author correctly identified English practice, his ultimate argument failed.

22. See, e.g., Citation Act, 1782 N.Y. Laws ch. 1 (An Act Relative to Debts Due to Persons Within the Enemy Lines).

confiscation of Tory property,²³ and (3) recovery in trespass for the Tories' use and occupation of Americans' land confiscated by the British during the war.²⁴ Such statutes violated Articles IV, V, and VI of the Treaty of Peace of 1783 with Great Britain.²⁵

Protecting Tories' rights had been one of Great Britain's chief demands in negotiating the Treaty of Peace²⁶ and in granting to the United States numerous rights and privileges.²⁷ In retaliation against the continued enforcement of the anti-Tory statutes, Great Britain refused to evacuate several garrisons on the Great Lakes and allowed its soldiers to capture some 3000 American slaves.²⁸ Anti-Tory statutes also shaped the thinking of Alexander Hamilton, one of the most influential Framers of the Constitution, who has been credited with calling the Constitutional Convention.²⁹ Hamilton saw the Supremacy Clause as resolving at

23. See, e.g., Confiscation Act, 1779 N.Y. Laws ch. 25 (An Act for the Forfeiture and Sale of the Estates of Persons Who Have Adhered to the Enemies of This State in Respect to all Property Within the Same). Note that some of the anti-Tory statutes were enacted before the war ended.

24. See, e.g., Trespass Act, 1783 N.Y. Laws ch. 31 (An Act for Granting a More Effectual Relief in Cases of Certain Trespases).

25. Article IV of the Definitive Treaty of Peace of 1783, between Great Britain and the United States, provided as follows: "It is agreed that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts, heretofore contracted." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796) (quoting Article IV of the Treaty). Article V of the Treaty provided: "That all persons who have any interest in confiscated lands, by DEBTS, should meet with no lawful impediment in the prosecution of their just rights." *Id.* at 238-39 (quoting Article V of the Treaty) (emphasis by capitalization in original). The treaty was ratified on January 14, 1784, and went into effect on April 9, 1784.

26. On January 14, 1784, the Continental Congress ratified the Treaty of Peace with Great Britain and called on the states to stop confiscating Tories' properties and to repeal laws preventing the collection of debts owed to Tories by American citizens, all of which conduct violated the Treaty. 1 THE DEBATE, *supra* note 20, at 1069-70. The states, however, failed to heed the injunction of the Congress.

27. Under the treaty, Great Britain recognized not only the independence of the United States but also its "claim to the territory west to the Mississippi, north to Canada, and south to the Floridas." 1 HARRY J. CARMAN ET AL., A HISTORY OF THE AMERICAN PEOPLE 215 (3d ed. 1967). Furthermore, Great Britain granted the United States fishing rights on the banks of Newfoundland, in the inshore waters of the British dominions in America, and in the unsettled bays and harbors along Canada's eastern coastline. *Id.*

28. See *infra* note 51.

29. RICHARD B. MORRIS, WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION 194-95 (1985).

a single stroke two critical, interrelated problems: first, assuring a strong central government; second, protecting the rights of foreigners and thereby encouraging foreign investment, speaking with one voice in international commerce, and avoiding friction with other countries.³⁰ After the war ended, but before the Constitutional Convention, Hamilton had handled a lawsuit, *Rutgers v. Waddington*,³¹ dealing with a treaty violation. The state court's reaction to the violation and the popular response to the court's opinion indelibly impressed upon him the need to elevate the status of treaties in the new constitution.³²

In *Rutgers*, Hamilton represented a Tory who had been sued for trespass under the New York statute.³³ After occupying New York City in 1778, the British seized some real property in the City and let two Tories operate a brewery on the premises.³⁴ They paid no rent from 1778 to 1780 but, upon order of the British Commander-in-Chief, paid rent into a poor person's fund thereafter until 1783.³⁵ After the war, the American owner³⁶ of the property sued under New York's Trespass Act to recover damages for the use and enjoyment of the property during the occupation.³⁷

Under the treaty, neither side was entitled to recover for seizures made during hostilities.³⁸ In arguing before the New

30. *Id.* at 184-85.

31. N.Y. Mayor's Ct., 1784, *removed by writ of error*, N.Y. Sup. Ct., 1784-1785, *cited in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 289-316 (Julius Goebel, Jr., ed., 1964) [hereinafter LAW PRACTICE].

32. 1 LAW PRACTICE, *supra* note 31, at 526-27.

33. *Id.* at 289.

34. *Id.* The merchants' names were Benjamin Waddington and Evelyn Pierrepont.

35. *Id.* at 290.

36. *Id.* at 289. The owner's name was Elizabeth Rutgers. She fled New York City when it was captured by the British during the summer of 1776. *Id.*

37. *Id.* at 291.

38. Article VI of the Treaty of Peace of 1783 provided as follows:

That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for, or by reason of any part, which he or they may have taken in the present war: and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty, or property; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced, be discontinued.

York Mayor's Court, Hamilton emphasized that the legitimate interests of foreigners had to be respected.³⁹ He relied upon the Treaty, the Articles of Confederation, and the law of nations.⁴⁰ The court rejected the treaty argument and, in a somewhat confusing opinion, determined that the legislature could not have intended the statute to apply when it would violate the law of nations.⁴¹ In a Solomon-like holding, appreciated by neither side, the court gave judgment to the American owner for the period from 1778 to 1780, for which the Tory occupants had paid no rent,⁴² but gave the occupants⁴³ judgment for the period from 1780 to 1783, during which they had paid rent under the order of the British military command.⁴⁴

A test case, *Rutgers* received wide publicity. Although Hamilton thought that the court had failed to uphold the Tories' rights under the treaty, anti-Tories nevertheless denounced the opinion.⁴⁵ *Rutgers* and its stormy reception persuaded Hamilton that making treaties legally enforceable was the only means of protecting the interests of foreigners in state courts.⁴⁶

Meanwhile, enforcement of the anti-Tory statutes led to continued British reprisals.⁴⁷ After investigating Britain's com-

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 273 (1796) (quoting Article VI of the Treaty). Hamilton argued that Article VI protected by implication an individual in the defendant's position. The phrase "nor any prosecutions commenced against any person or persons, for, or by reason of any part, which he or they may have taken in the present war" suggests that a British Army licensee could not be prosecuted for having occupied real property seized during the conflict. 1 LAW PRACTICE, *supra* note 31, at 298-99.

39. 1 LAW PRACTICE, *supra* note 31, at 299, 305.

40. *Id.* at 297, 304-05.

41. *Id.* at 308-09.

42. *Id.* at 306-07.

43. Judgment actually ran to Joshua Waddington, their agent, and the named party in the lawsuit. *Id.* at 291.

44. The court reasoned that the Tory occupants were not acting under military orders until 1780 and that the legislature did not intend to have the Trespass Act apply in such a way as to violate the law of nations, which provided for no compensation for property seized under military orders. *Id.* at 308-09.

45. The State Assembly passed a resolution criticizing the decision for "its tendency subversive of all law and order" to undermine the authority of the legislature. *Id.* at 312 (quoting *NY Assembly Journal*, 8th Assembly, 1st meeting 33 (Oct. 4-Nov. 29, 1784)).

46. 1 LAW PRACTICE, *supra* note 31, at 282; MORRIS, *supra* note 29, at 44-45.

47. MORRIS, *supra* note 29, at 148.

plaints that the states had violated the treaty by enacting and enforcing the anti-Tory laws, John Jay⁴⁸ issued his famous catalog of infractions to the Continental Congress.⁴⁹ Jay had conducted a thorough investigation and informed the Congress of his conclusion that the states had violated the treaty first.⁵⁰ By 1787, Great Britain had made clear that it would carry out its treaty obligations only if the American states honored their commitments to the Tories.⁵¹ To help resolve this issue, Federalists exhorted the Continental Congress to adopt a constitutional provision making treaties superior to state constitutions and statutes and enforceable by individuals in state courts.⁵² In the end,

48. Jay had been president of the Continental Congress, one of the diplomats who negotiated the Treaty of Peace, an ambassador to Spain and Great Britain, and later the first Chief Justice of the Supreme Court. 1 WILLIAM JAY, *THE LIFE OF JOHN JAY* v-vi (1972).

49. According to Jay, these infractions occurred before British soldiers captured slaves. MORRIS, *supra* note 29, at 149.

50. *Id.* at 148-49. Documents now available reveal, however, that Britain, though unquestionably incensed about the United States' violations of the treaty, used them as a pretext to violate the treaty themselves:

[A]t a secret meeting in the British Colonial Office on April 8, 1784—the day before the treaty went into effect—the British decided to retain [their] posts [in the Northwest Territories] in order to enlist the aid of friendly Indians in checking the advance of American settlement and to protect the lucrative Scottish Canadian fur trade in the Northwest.

CARMAN ET AL., *supra* note 27, at 241.

51. On February 28, 1786, the British government told John Adams that the British would not evacuate their forts in the Northwest Territories until the Americans met their treaty obligations by permitting British creditors to collect their debts and by compensating the Tories for confiscations. *THE DEBATE*, *supra* note 20, at 1073. The states' anti-Tory statutes and refusal to honor contracts with British creditors caused continued friction between the United States and Great Britain. This dispute was not resolved until the Jay treaty was ratified in 1795. The treaty called for, among other things, the payment of English creditors as originally provided in the Treaty of Peace of 1783. FORREST McDONALD, *ALEXANDER HAMILTON* 317 (1982). Great Britain did not abandon her posts on American soil until 14 years after the Treaty of Peace was signed. *Id.*

52. James Madison stated that, for a treaty "[t]o render succeeding laws void, it must have more than the mere authority of a law [that would only repeal all antecedent laws]." 9 PAPERS OF JAMES MADISON 327 (Robert A. Rutland ed., 1975). An earlier letter to Madison had complained that a lack of uniform compliance among the states as to treaty obligations with Great Britain left Britain at liberty to capture American ports and American slaves. *Id.* at 63. Madison also noted in *The Federalist* that, because the state constitutions differed, "it might happen that a treaty or national law of great and equal importance to the states, would interfere with some and

the Congress passed a resolution calling upon the states to repeal laws that were "repugnant to the treaty"⁵³ More importantly, the resolution asserted that treaties are "part of the law of the land, and [are] not only independent of the will and power of such [state] Legislatures, but also binding and obligatory on them."⁵⁴ This resolution was the forerunner of the treaty provision in the Supremacy Clause, which the Constitutional Convention included in Article VI a few months later.⁵⁵

Drawing on his experience in *Rutgers*, observing the results of the anti-Tory statutes,⁵⁶ and convinced of the utter folly of thirteen loosely joined independent states, Hamilton concluded that the new constitution needed a supremacy clause "buttressed by an independent judiciary"⁵⁷ Consequently, he devoted much of his energy to supporting the Supremacy Clause.⁵⁸ He subse-

not with other constitutions, and would consequently be valid in some of the states at the same time that it would have no effect in others." 10 *id.* at 425 (quoting THE FEDERALIST No. 44 (James Madison)).

53. MORRIS, *supra* note 29, at 149.

54. *Id.*

55. *Id.*

56. On March 21, 1787, only a few months before the Constitutional Convention, Hamilton argued for passage of his bill repealing that part of the Trespass Act that prohibited pleas of military justification: "He said no state was so much interested in the due observance of the treaty, as the state of New-York; the British having possession of its western frontiers. And which they hold under the sanction of our not having complied with our national engagements." 4 THE PAPERS OF ALEXANDER HAMILTON 121 (Harold C. Syrett ed., 1962) [hereinafter PAPERS].

On April 17, 1787, less than a month before the convention, he argued for the passage of an "Act Repealing Laws Inconsistent with the Treaty of Peace." The act was passed by the N.Y. Assembly but failed to pass in the Senate. 1 LAW PRACTICE, *supra* note 31, at 524 n.196.

57. MORRIS, *supra* note 29, at 47.

58. Hamilton's proposed constitution, which he apparently gave to Madison at the close of the Constitutional Convention, contained a clause that closely resembled the Supremacy Clause: "The laws of the United States and the treaties which have been made under the articles of confederation and which shall be made under the constitution shall be the supreme law of the land and shall be so construed by the Courts of the several states. ~~Anything to the contrary notwithstanding.~~" 4 PAPERS, *supra* note 56, at 270 (quoting art. VII, § 6 of Alexander Hamilton's proposed constitution) (language stricken in original). Although Hamilton did not draft the Supremacy Clause, his writings both before and after the convention, his proposed constitution, his actions in the New York Legislature to abolish the anti-Tory statutes, and his addresses to the New York state ratifying convention evince his commitment to the Supremacy Clause. McDONALD, *supra* note 51, at 95-115. Luther Martin, the Maryland delegate and states' rights advocate, drafted the final version of the Clause. MORRIS, *supra* note

quently explained his position at length in four separate issues of the *Federalist Papers*.⁵⁹

For example, in Numbers 22 and 80 of *The Federalist*, he discussed two related issues: first, for treaties to have any effect, courts must have the authority to apply them and individuals generally must have the right to invoke them; second, to avoid conflicts with other countries, foreigners must receive access to our courts and the right to invoke treaties as the rule of decision.⁶⁰ Specifically, in Number 22, he wrote:

A circumstance, which crowns the defects of the confederation, remains yet to be mentioned—the want of a judiciary power. 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.⁶¹

On the need to recognize foreigners' rights in courts, Hamilton wrote in Number 80:

The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.⁶²

Hamilton later made clear, in Number 80, that state and federal courts must acknowledge the rights of foreigners to invoke treaties

29, at 218.

59. THE FEDERALIST Nos. 22, 33, 78 (Alexander Hamilton); THE FEDERALIST No. 80, *supra* note 2.

60. THE FEDERALIST No. 22, *supra* note 59; THE FEDERALIST No. 80, *supra* note 2.

61. THE FEDERALIST No. 22, *supra* note 59.

62. THE FEDERALIST No. 80, *supra* note 2. This particular paper of *The Federalist* was published less than three weeks before the critical New York State Convention, in which Hamilton has been credited with turning around a majority of the delegates who had been opposed to ratifying the constitution. MCDONALD, *supra* note 51, at 114-15.

to prevent such foreigners from complaining to their home countries about unjust treatment at the hands of the United States' federal or state governments.⁶³

Hamilton's dismay about the treaty violations was broadly shared by the Framers⁶⁴ and extended to some anti-Federalists.⁶⁵ One important anti-Federalist opposed the Constitution as written, and the treaty power in particular, because the Supremacy Clause implicitly excluded the House of Representatives and because nothing in the proposal expressly placed constitutional limits on the treaty power.⁶⁶ He nevertheless acknowledged that

63. THE FEDERALIST No. 80, *supra* note 2. In that same essay, Hamilton expanded on his concern about avoiding hostilities by providing foreigners with recourse to independent national tribunals empowered, among other things, to apply treaties and domestic law as the rule of decision:

But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations.

4 PAPERS, *supra* note 56, at 668; see also Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 762 (1988) (quoting William Davie, a North Carolina delegate to the Constitutional Convention: "It was necessary that treaties should operate as laws on individuals. They ought to be binding upon us the moment they are made. They involve in their nature not only our own rights, but those of foreigners [and should be protected by the federal judiciary].") For very good discussions of the Framers' intent in making treaties the law of the land, see Paust, *supra*, and Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097-1110 (1992).

64. Benjamin Franklin proposed adding the language concerning treaties to the first draft of the Supremacy Clause. 3 ELLIOT'S DEBATES, *supra* note 21, at 45. In moving to give Congress a veto power over state legislation, Charles Pinckney, delegate of South Carolina, noted, among other things, that the states repeatedly violated foreign treaties. *Id.* at 86. In seconding the motion, James Madison remarked that the states "evinced a constant tendency to violate national Treaties." *Id.* at 87.

65. See, e.g., A Letter of His Excellency Edmund Randolph, Esquire on the Federal Constitution (Oct. 10, 1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 21, at 86, 88 (decrying the inability of the confederation to honor the law of nations or enforce the treaties).

66. *Essay XIII of Brutus*, N.Y. J., Feb. 21, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 21, at 377, 428-29 ("For as treaties will be the law of the land, every person who have rights or privileges secured by treaty, will have aid of the courts of law, in recovering them."). Storing classifies the essays of Brutus as "among the most important Anti-Federalist writings." *Id.* at 358; see also *Essays of an Old Whig III*, *supra* note 21, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 21, at 27-28.

treaties must have the force of law.⁶⁷ The two major proposals that became the focus of the debate in the Constitutional Convention recognized the importance of the treaty power.⁶⁸ Both the New Jersey plan, which favored states' rights, and the Virginia plan, which favored a strong central government, elevated treaties to the status of law and made them supreme over inconsistent state statutes.⁶⁹ In sum, the Framers were anxious to avoid disputes with foreign countries⁷⁰ that might arise if we denied foreign citizens either treaty rights or access to our courts.⁷¹ Aside from avoiding conflicts with other states, the Framers desired to establish a uniform foreign trade policy and to encourage wealthy foreigners to do business with, and to move to, the United States.⁷² The Framers also wanted to demonstrate to the world the respect that the new nation held for the rule of law.⁷³

67. *Essays of an Old Whig III*, *supra* note 21, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 21.

68. 3 ELLIOT'S DEBATES, *supra* note 21, at 113, 117-18. The New Jersey plan was largely rejected; the constitution that emerged resembles the Virginia plan in broad outline. The Supremacy Clause, however, does find part of its root structure in the New Jersey plan.

69. *Id.*

70. James Madison, however, criticized the New Jersey plan for not going far enough to prevent treaty violations: "Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances." *Id.* at 139. In his preface to the constitutional debates, Madison noted that the authority of the Continental Congress to make treaties binding on all the states had been ignored not only concerning the Treaty of Peace but also concerning treaties with other countries. *Id.* at 19-20.

71. In a thoughtful article, one commentator noted that

the Framers were concerned about treaty violations in part because such violations could offend other states and perhaps lead to calamity and war. The Framers empowered foreign nationals to utilize our courts to enforce the nation's treaty commitments in part to cure any such violations *before* they gave rise to international friction.

Vázquez, *supra* note 63, at 1160 (emphasis in original).

72. At the Virginia Convention, James Madison said: "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and thus has prevented many wealthy gentlemen from trading or residing among us." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring) (quoting 3 ELLIOT'S DEBATES 583 (1888)), *cert. denied*, 470 U.S. 1003 (1985).

73. In Pennsylvania, James Wilson, a delegate to the Convention, stated: "[We] will show the world that we make the faith of treaties a constitutional part of the character of the United States; that the judges of the United States will be enabled to carry it into effect." *Id.* at 763 (quoting 2 ELLIOT'S DEBATES, *supra* note 21, at 490).

To accomplish these objectives, the Framers made treaties the supreme law of the land, enforceable by individuals in state and federal courts.⁷⁴

b. The Supreme Court's First Interpretation of a Treaty

Seven years after the ratification of the Constitution, the Supreme Court in *Ware v. Hylton*⁷⁵ had its first opportunity to construe a treaty—the Treaty of Peace between the United States and its former colonial master, Great Britain.⁷⁶ In finding that the treaty revived the debts citizens owed to British subjects, the Court concluded that the treaty overrode inconsistent state law.⁷⁷ The Court thus permitted the Tory creditors to invoke the treaty in a lawsuit against American debtors, much as Hamilton had urged in *Rutgers*.⁷⁸ *Ware* effectuated one of the purposes of making treaties the law of the land—avoiding international conflict. By enforcing the treaty, the Court prevented British creditors from demanding that Great Britain take action against the United States for failing to honor the rights of British citizens.

(alteration in original).

74. The Supremacy Clause solved the most critical issue facing the 13 newly independent states—forming a strong central government without necessarily usurping the sovereignty of the individual member states. Rather than giving Congress the power to veto state legislation, which Madison proposed in the Virginia plan, the Supremacy Clause instead made federal law and treaties superior to state law, implicitly granting to the federal courts the authority to determine when state laws contravened federal statutes and treaties. See U.S. CONST. art. VI, § 2.

75. 3 U.S. (3 Dall.) 199 (1796).

76. *Id.*

77. Justice Chase stated:

[T]he treaty of 1783 has superior power to the *Legislature* of any State, because no Legislature of any State has any kind of power over the Constitution, which was its *creator* [and] it is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to that treaty (or any other) made under the authority of the *United States, null and void*. National or Federal Judges are bound by duty and oath to the same conduct.

Id. at 237 (Chase, J., concurring) (all members of the Court filed an opinion); accord *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 360 (1816); see Paust, *supra* note 63, at 765 nn.35-37 (collecting early American cases finding treaties self-executing).

78. The treaty did not give such a creditor a cause of action expressly, but the Court, nevertheless, allowed the creditor to invoke the treaty in the trial court. *Ware*, 3 U.S. (3 Dall.) at 243-44; see *supra* note 25 and accompanying text.

Both the states' blatant violations of the treaty and the firm belief that the rights of foreigners had to be respected to stave off foreign hostilities and to encourage foreign trade and investment underlay the Framers' crafting of Article VI, clause 2 of the Constitution. The underlying assumption shared by both detractors and advocates of Article VI was that Article VI gave individuals the right to assert treaties in federal and state courts as rules of decision.

B. Base of the Non-Self-Executing Treaty Doctrine in the United States

1. Origin of the Doctrine

At first glance, the non-self-executing treaty doctrine appears to violate the Framers' intent that individuals be able to assert applicable treaties in state and federal courts. Certainly, a broad or incorrect interpretation of the doctrine may have that effect. One needs to examine carefully how the doctrine arose and how narrowly circumscribed it is to understand its purpose in American treaty law. The doctrine of non-self-execution did not emerge here until 1829, forty-two years after the signing of the Constitution. Narrowly interpreting a treaty between the United States and Spain, the Supreme Court in *Foster & Elam v. Neilson*⁷⁹ instituted the doctrine in this country.

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially so far as its operation is infra territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty address-

79. 27 U.S. (2 Pet.) 253 (1829).

es itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.⁸⁰

Foster held that the treaty was non-self-executing but later overruled itself upon closer examination of a translation of the Spanish text. The treaty dealt with the validity of Spanish land grants made in Florida before it became part of the United States. The eighth article of the treaty in the English original stated:

[A]ll the grants of lands made before the 24th January, 1818, by his Catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, *shall be ratified and confirmed* to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty⁸¹

The emphasized language differed in the Spanish original; translated, the Spanish text said that such grants “shall *remain* ratified and confirmed.”⁸² Noting that the Spanish version conformed to international practice and construing both originals together, the Court reversed itself and found that the treaty language was self-executing.⁸³

Apparently, the Court initially had read the language “shall be ratified and confirmed” not to be mandatory⁸⁴ but to be a future, executory obligation—that is, meaning that the grant “*will* be ratified and confirmed” after the treaty was to come into force.⁸⁵

80. *Id.* at 314.

81. *Id.* at 274 (quoting the “Florida Purchase Treaty” between the United States and Spain of February 22, 1819) (emphasis added).

82. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833) (The Spanish version of this article is: “Todas las concesiones de terrenos *quedaran ratificados y reconocidas* a las personas que esten en posesion de ellas.”) (emphasis added).

83. *Id.* at 87-88.

84. The Supreme Court has recognized that “shall” generally means mandatory. *See infra* notes 97-101 and accompanying text; *see also* REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* § 9.4 (2d ed. 1986) (stating that “shall” indicates an obligation to act).

85. The Ninth Circuit employed a similar analysis in *Islamic Republic v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985). *Islamic Republic* dealt with the executive agreement between the United States and Iran over the release of the American hostages and of the unfreezing of Iranian assets in the United States. The court concluded that the

Commentators have criticized *Foster's* distinction between executory and executed treaty provisions as unworkable.⁸⁶ Self-executing treaties may come into effect at a future date.⁸⁷ Because, after more closely examining the treaty language, the Court overruled *Foster*, that case should be read for the narrow proposition that a treaty or treaty provision that makes itself non-self-executing is non-self-executing and thus requires implementing legislation to be invoked in court.⁸⁸ A more encompassing aspect of the doctrine concerns whether enforcing the treaty violates separation-of-powers principles.

2. *Separation of Powers, Principles of Contract, and Non-Self-Executing Treaty Terms*

Digging out the foundation of the United States' non-self-executing treaty doctrine reveals that the doctrine rests largely on constitutional grounds. Determining whether a treaty is self-executing or non-self-executing is a question of domestic law.⁸⁹ In the United States, the Supremacy Clause forms the base of this applicable domestic law. The Clause's history and plain meaning suggest that the Framers presumed that most treaties would be self-executing. By enforcing some treaty terms, however, the courts might usurp the power of a co-equal branch of government or otherwise violate the Constitution.⁹⁰ To avoid such conflicts,

pact was "couched in executory language" and quoted the following terms: "[T]he United States agrees to terminate all legal proceedings in United States courts involving claims against Iran, [agrees] to nullify all attachments and judgments obtained therein, [agrees] to prohibit all further litigation based on such claims, and [agrees] to bring about the termination of such claims through binding arbitration." *Id.* at 1283 (quoting from the Accords between the United States and the Islamic Republic of Iran) (emphasis added by the court). Because of the asserted executory character of these Accords, the court found them non-self-executing. *Id.* at 1283-84.

86. Iwasawa, *supra* note 14, at 685; accord Paust, *supra* note 63, at 770-71.

87. See Oscar Schacter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 645 (1951).

88. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111(4)(a) (1987). This contractual principles component of the doctrine of non-self-executing treaties is discussed in the next section. Commentators also have phrased the rule of *Foster* more generally as follows: "Thus, a treaty which requires no legislation to make it operative within the national legal order is said to be 'self-executing.'" BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 191 (1980).

89. See *supra* part II.A.1.

90. Although not clear from the wording of the Supremacy Clause, a treaty may not

the courts have declared such treaty terms non-self-executing.⁹¹

These potential constitutional violations typically involve separation-of-powers conflicts. A treaty term is not self-executing if it requires action that the Constitution authorizes only Congress to perform. For example, by purporting to declare war or by requiring the allocation of funds, a treaty would usurp the House's constitutional role and would be unenforceable.⁹² A treaty term is not self-executing if it is nonjusticiable⁹³—that is, if its judicial enforcement would usurp exclusive, constitutionally granted executive power over critical foreign policy issues.⁹⁴ A treaty term

violate the Constitution. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957).

91. See *Robertson v. General Elec. Co.*, 32 F.2d 495 (4th Cir.) (peace treaty regarding patents on industrial property), *cert. denied*, 280 U.S. 571 (1929); *Sei Fujii v. State*, 217 P.2d 481 (Cal. Dist. Ct. App.), *reh'g denied*, 218 P.2d 595 (Cal. Dist. Ct. App. 1950), *rev'd on this issue and aff'd on other grounds*, 242 P.2d 617 (1952) (en banc); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporter's note 5 (citing *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39 (1913)) (giving effect to congressional view that industrial property treaty was non-self-executing). For a discussion of *Sei Fujii*, see *infra* note 108 and accompanying text.

92. *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir.) (noting that, in the following areas, among others, the treaty-making power is not "concurrent" with congressional power: Congress has exclusive authority to declare war, to appropriate money, and to raise taxes) (quoting Article I, § 9, cl. 7, of the Constitution: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."), *cert. denied*, 436 U.S. 907 (1978); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 cmt. 1, at 47-48. For a conflicting view, see Paust, *supra* note 63, at 775-81, in which the author argues that Congress does not have *exclusive* power to allocate funds or to raise taxes. Consequently, except for declarations of war, Paust would not render treaties non-self-executing for want of the approval of the House of Representatives. Authorities have asserted that criminal offenses may not be established by treaty because that power requires congressional action. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 cmt. 1, at 48. *But see Ford v. United States*, 273 U.S. 593, 618 (1927) (implying that the United States' criminal jurisdiction could be expanded by treaty alone).

93. *Diggs v. Schultz*, 470 F.2d 461, 466-67 (D.C. Cir. 1972) (holding that Congress may violate a treaty and finding nonjusticiable a lawsuit to compel the president to comply with a treaty in the face of Congress's clear intent to violate the pact), *cert. denied*, 411 U.S. 931 (1973).

94. The political question doctrine rests on the separation of powers. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Three principal questions underlie the doctrine: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring); see *Baker*, 369 U.S. at 217 (formulating a similar six-prong test that Justice Powell has summarized and reduced to three).

A party asserting the political question doctrine must receive an affirmative response to at least one of the above three questions. By making treaties the "supreme Law of the Land" and by extending judicial power "to all Cases in Law and Equity, arising under Treaties," the Constitution textually commits the handling of treaty questions to the judiciary, leading to a negative response to the first question of Justice Powell's summary of the *Baker* test. U.S. CONST. art. VI, cl. 2; *id.* art. III, § 2, cl. 1; *see also supra* note 1 (observing that the Judiciary Act of 1789 gave jurisdiction to federal courts in treaty cases).

The second question involves whether "judicially discoverable and manageable standards" exist to resolve the dispute, *Baker*, 369 U.S. at 217, and whether adjudicating the case enmeshes the judiciary in nonjudicial policymaking, *id.* Answering this question depends largely on the treaty in question and the court's experience in construing such treaties or construing statutes having provisions similar to such treaties. On the one hand, a treaty prohibiting the development of space-based antiballistic missiles (ABMs) and a dispute over whether developing space-based ABM systems violates the treaty, for example, may engage the court in nonjudicial policymaking. On the other hand, treaties dealing with extradition and similar subjects come within the courts' experience and core functions. *See* 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE § 4-3, at 76 (2d ed. 1987).

The third question—the prudential test—inquires whether judicial action shows abject disrespect towards another branch, whether there is "an unusual need for unquestioning adherence to a political decision already made," *Baker*, 369 U.S. at 217, or whether such a decision will cause "embarrassment from multifarious pronouncements by various departments on one question," *id.* In this context, the issue is whether the need to speak in one voice in foreign affairs renders the question political. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 112 cmt. c. To avoid such a possibility, the Court has adopted a general rule of deferring to the executive in interpreting treaties and in handling other international law questions. *Id.* The Court has, however, occasionally rejected the executive's interpretation. *See, e.g.,* *Perkins v. Elg*, 307 U.S. 325 (1939) (reversing the Executive's determination that an individual was not a citizen pursuant to a treaty); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 18 (1936) (concluding that, absent authorization by statute or treaty, the President lacked power to surrender a fugitive to France); *Cook v. United States*, 288 U.S. 102 (1933) (disagreeing with the government's interpretation of a treaty allowing search of vessels off the U.S. coast); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (finding no statutory authorization for the Navy's seizure of a Danish vessel).

Political questions in the foreign affairs context are a matter of line drawing. Nevertheless, the history of Article VI and of case law that has interpreted treaties suggest that the line should be drawn to make only the exceptional case nonjusticiable. Because Congress can breach and the executive can denounce a treaty, those branches have the power to avoid complying with a treaty if considered in the broader interests of the federal government. *See Goldwater*, 444 U.S. 996; *Diggs*, 470 F.2d 461. When a treaty imposes direct responsibility upon the executive, only a usurpation of the president's role in foreign affairs or of the president's constitutional power as commander-in-chief would render the question nonjusticiable. *See Goldwater*, 444 U.S. at 999 (Powell, J., concurring); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (reversing a presidential order because the president is bound by the Constitution in time of war); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION

is not self-executing if it is so vague that, by construing the term, courts would be encroaching upon the exclusive power of the president and the Senate to make treaties. By applying a vague term to a specific case, a court could de facto legislate at variance with what the president and two-thirds of the Senate intended in making the treaty into law.⁹⁵ Courts test this last potential separation-of-powers conflict by closely examining the treaty language to determine whether it speaks in words of command and uses sufficiently precise terms to impose a legal obligation.

Generally, American courts have refused to apply a treaty when it merely exhorts the states to "use best efforts" or to "promote" a given objective,⁹⁶ reasoning that such language does not connote a legal obligation but merely a moral obligation or aspiration. In *INS v. Cardoza-Fonseca*,⁹⁷ the Supreme Court compared the language of Articles 33.1 and 34 of the 1967 Protocol Relating to the Status of Refugees.⁹⁸ Although not dealing expressly with the

221-22 (1972) (commenting on the limited "legislative power" of the courts in foreign affairs); Jordan J. Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. 719, 727 n.24 (1982) (citing, among other cases, *The Paquete Habana*, 175 U.S. 677 (1900) (voiding an executive seizure of an enemy vessel in time of war)); Vázquez, *supra* note 63, at 1128-33 (discussing the separation-of-powers issues underlying justiciability inquiries). *But see* Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736 (1992) (arguing that the *Alvarez-Machain* decision can be defended on the ground that it posed a political question); Michelle D. Gouin, Note, *United States v. Alvarez-Machain: Waltzing with the Political Question Doctrine*, 26 CONN. L. REV. 759 (1994) (arguing but deploring that the real basis for the Court's decision in *Alvarez-Machain* was the political question doctrine).

95. Iwasawa, *supra* note 14, at 672; *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 90 n.2 (2d ed. 1986) (citing *James v. Bowman*, 190 U.S. 127 (1903); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Evans*, 333 U.S. 483 (1948), for the proposition that separation of powers prohibits Congress from "pass[ing] the law-making job on to the judiciary" by enacting an ambiguous statute). Additionally, a vague term does not give fair warning to the party against whom the provision is enforceable. *Id.* at 91. This policy consideration, however, appears to apply only to duties imposed on individuals, not duties imposed on the government. These two policy concerns likewise underlie the void-for-vagueness doctrine. *See* *Kolender v. Lawson*, 461 U.S. 352 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

96. *See, e.g., In re Alien Children Litig.*, 501 F. Supp. 544, 590 (S.D. Tex. 1980), *aff'd unreported mem.*, (5th Cir. 1981), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982); *Sei Fujii v. State*, 242 P.2d 617, 620 (Cal. 1952) (en banc).

97. 480 U.S. 421 (1987).

98. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

doctrine of self-executing treaties, the case is instructive in distinguishing mandatory from hortatory language. Article 33.1 provides: "No Contracting State *shall expel or return* ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁹⁹ In contrast, Article 34 provides that contracting states "*shall as far as possible* facilitate the assimilation and naturalization of refugees."¹⁰⁰ The Court stated of the latter provision:

[T]he provision is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible. Thus, as made binding on the United States through the Protocol, Article 34 provides for a precatory, or discretionary, benefit for the entire class of persons who qualify as 'refugees,' whereas Article 33.1 provides an entitlement for the subcategory that 'would be threatened' with persecution upon their return.¹⁰¹

A case involving the Charter of the Organization of American States (OAS) also illustrates the criteria for mandatory language.¹⁰² Article 47 of the Charter provides as follows:

The Member States *will exert the greatest efforts*, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:
(a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge.¹⁰³

99. *Id.* at 6276 (emphasis added).

100. *Id.* (emphasis added).

101. *Cardoza-Fonseca*, 480 U.S. at 441.

102. *In re Alien Children Litig.*, 501 F. Supp. 544, 590 (S.D. Tex. 1980), *aff'd unreported mem.*, (5th Cir. 1981), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982). This case and the above quoted language are discussed in NEWMAN & WEISSBRODT, *supra* note 15, at 580-81.

103. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (entered into force for the United States, Dec. 13, 1951); Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, art. 47, 21 U.S.T. 607, 672, 721 U.N.T.S. 324, 340 (entered into force for the United States, Feb. 27, 1970) (emphasis added).

The court held that the OAS charter language was not sufficiently mandatory to establish a rule of law binding in an American court. The court noted that the emphasized words are "not the kind of promissory language which confers rights in the absence of implementing legislation"¹⁰⁴ but also indicated that, had that preamble been absent, subsection (a) would have passed muster under the self-executing treaty doctrine.¹⁰⁵

Besides requiring mandatory language, most United States courts have held that general treaty language does not give rise to a legal obligation—that the language must be specific for an individual to invoke the treaty in a domestic court.¹⁰⁶ When interpreting an imprecise treaty term, a court runs the risk of legislating and thereby encroaching upon the president's and the Senate's exclusive treaty-making power. State and lower federal courts have imposed quite rigorous requirements in many cases, suggesting a veiled attempt at limiting treaty application in United States courts.¹⁰⁷

104. *In re Alien Children Litig.*, 501 F Supp. at 590.

105. *Id.*

106. *See, e.g.*, *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *American Baptist Churches v. Meese*, 712 F Supp. 756, 769-70 & n.7 (N.D. Cal. 1989) (finding the following Article (Art. 1) of Geneva Convention Relative to the Protection of Civilian Persons in the Time of War too vague to be enforced: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."); *see also* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (finding non-self-executing the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)), *cert. denied*, 470 U.S. 1003 (1985); *United States v. Postal*, 589 F.2d 862, 878 (5th Cir.) (holding that Article 6 of the Convention on the High Seas established only a general principle, not law), *cert. denied*, 444 U.S. 832 (1979); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (criticizing generality of the treaty language); *Haitian Refugee Ctr., Inc. v. Gracey*, 600 F Supp. 1396, 1406 (D.D.C. 1985) (holding that the United Nations Protocol is not self-executing and that the Universal Declaration of Human Rights is "merely a non-binding resolution"), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

107. *See, e.g.*, *United States v. Aguilar*, 883 F.2d 662, 681 (9th Cir. 1989) (determining summarily that the U.N. Protocol Relating to the Status of Refugees is non-self-executing), *cert. denied*, 498 U.S. 1046 (1991); *United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987) (noting summarily in dicta that Article 6 of the Convention on the High Seas is not self-executing when the Coast Guard attempts to board in international waters a foreign vessel suspected of drug smuggling). Article 6.1 provides that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to

For example, *Sei Fujii*¹⁰⁸ is often considered the seminal case on non-self-execution. In that case, a Japanese national challenged a California statute that prohibited foreigners from owning land in California.¹⁰⁹ The California Court of Appeals concluded that the statute violated Articles 55 and 56 of the U.N. Charter.¹¹⁰ The Supreme Court of California affirmed—on due process grounds—and expressly rejected the grounds relied upon by the lower court.¹¹¹

Article 55 provides that the United Nations “shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,” and, in Article 56, the member nations “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”¹¹² After analyzing the language of the preamble and Articles 1, 55, and 56 of the Charter, the California Supreme Court determined that the latter two articles were not self-executing.¹¹³ The court reasoned that the two articles were not “clear [or] definite” enough to “manifest[an] intention” that they operate without the aid of implementing legislation¹¹⁴ and further noted that “[t]hey state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual members or to create rights in private persons.”¹¹⁵ The California Supreme Court asserted that other articles, in contrast to Articles 55 and 56, did contain clear and definite language,¹¹⁶ indicating that they stated a legal rule that could operate domestically.¹¹⁷

its exclusive jurisdiction on the high seas.” Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312 (for the United States, Sept. 30, 1962).

108. *Sei Fujii v. State*, 217 P.2d 481 (Cal. Dist. Ct. App.), *reh’g denied*, 218 P.2d 595 (Cal. Dist. Ct. App. 1950), *rev’d on this issue but aff’d on other grounds*, 242 P.2d 617 (Cal. 1952) (en banc).

109. *Id.*

110. *Id.* at 481, 487-88.

111. *Sei Fujii v. State*, 242 P.2d 617, 617, 620 (Cal. 1952) (en banc).

112. U.N. CHARTER arts. 55-56 (emphasis added).

113. *Sei Fujii*, 242 P.2d at 620.

114. *Id.* at 621.

115. *Id.* at 620-21.

116. *See id.* at 621 (citing *Curran v. City of New York*, 77 N.Y.S.2d 206 (Sup. Ct. 1947) (concluding that Articles 104 and 105 are self-executing)).

117. Article 104, for example, provides: “The Organization shall enjoy in the territory

Sei Fujii provoked considerable scholarly commentary, most of it critical.¹¹⁸ Although the language of Articles 55 and 56 of the U.N. Charter is not as precise as one might wish,¹¹⁹ United States courts have had little hesitation in construing much vaguer terms from the Constitution, such as “due process,” “equal protection of the laws,” and “reasonable searches and seizures.” American courts, both state and federal, also routinely interpret such nebulous terms as “reasonable foreseeability,” “good faith,” and “proximate cause.”¹²⁰

of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.” U.N. CHARTER art. 104 (emphasis added). Article 105 provides:

1. The Organization *shall enjoy* in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization *shall* similarly *enjoy* such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Id. art. 105 (emphasis added).

118. See, e.g., LILLICH & NEWMAN, *supra* note 14, at 76; Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 303-04 (1983); Quincy Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J. INT'L L. 62 (1951); Comment, *U.N. Charter Invalidates Alien Land Law*, 2 STAN. L. REV. 797, 809 (1950). *Contra* Manley O. Hudson, *Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L L. 543, 545 (1950) (arguing that Articles 55 and 56 are not self-executing). One commentator has implied that *Sei Fujii* is the *Plessy v. Ferguson* of human rights law. R. LILLICH, *INTERNATIONAL HUMAN RIGHTS* 116 (2d ed. 1993).

119. Some human rights groups have argued that the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights have become recognized as “authoritative” interpretations of Articles 55 and 56 of the Charter. Consequently, they lend sufficient specificity for Articles 55 and 56 to be enforced in a domestic court. NEWMAN & WEISSBRODT, *supra* note 15, at 582 n.14.

120. For example, trying to establish “universal tests” for proximate causation is “demonstrably erroneous” because determining causation is “a matter of common sense and moral intuitions.” JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 158 (1987) (quoting Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 303, 317 (1912)). Compare *United States v. Knowles*, 26 F. Cas. 800 (N.D. Cal. 1864) (No. 15,540) (finding a ship’s master not guilty for failing to turn a boat about to attempt rescue of a crew member who had fallen overboard because but-for causation had not been proved beyond a reasonable doubt) with *Commonwealth v. Howard*, 402 A.2d 674 (Pa. Super. Ct. 1979) (finding proximate causation satisfied when a defendant-mother of five-year-old child failed to intervene when the mother’s boyfriend physically abused the child, resulting in death).

Other provisions of the U.N. Charter have been held self-executing in only a handful of cases, the most noteworthy being *Saipan v. United States Department of Interior*.¹²¹ In that case, citizens of Micronesia, a trust territory administered by the United States, sued to challenge the granting of a lease to Continental Airlines for the construction of a hotel on public land next to Micro Beach, an important historical, cultural, and recreational site.¹²² Article VI of the Trusteeship Agreement for the Pacific Islands¹²³ provides that the United States shall "promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources" and requires the United States to take steps to "protect the inhabitants against the loss of their lands and resources."¹²⁴ Noting that the Trusteeship Agreement was the plaintiff-islanders' "basic constitutional document," the Ninth Circuit determined that the article was self-executing and that the plaintiffs could invoke it in their action.¹²⁵

In deciding whether a treaty term is sufficiently precise, courts also consider whether its terms are cast negatively. Negative treaty provisions—namely, obligations not to act—are more likely

121. 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); *see also* Keeney v. United States, 218 F.2d 843, 845 (D.C. Cir. 1954) (concluding that U.N. personnel rules forbidding disclosure of confidential information accorded defendant, a U.N. employee, a privilege against testifying about an employment matter).

122. *Saipan*, 502 F.2d at 93.

123. 61 Stat. 3301, 3301-02 (1947).

124. *Id.* at 3302.

125. *Saipan*, 502 F.2d at 98. The court required the following factors to be considered:

[T]he purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the viability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self execution.

Id. at 97 (citation omitted); *cf.* *Frolova v. USSR*, 761 F.2d 370, 373 (7th Cir. 1985). *Frolova* required an examination of similar factors:

(1) [T]he language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.

Id., *see* Vázquez, *supra* note 63, at 1120 n.140 (criticizing the *Frolova* formulation as one that hides the real issues comprising the doctrine of self-executing treaties).

to be judged self-executing than are affirmative provisions.¹²⁶ This rule of construction probably rests, in part, on the fact that negatively drafted provisions are often more precise than are affirmative ones¹²⁷ and, in part, on the fact that the negative nature of such a treaty term implicitly eliminates¹²⁸ the need for implementing legislation.¹²⁹

Aside from the constitutional and separation-of-powers considerations, the doctrine of non-self-execution draws on contractual principles. A treaty term is not self-executing if it expressly makes itself non-self-executing. In *Cardenas v. Smith*,¹³⁰ for example, the mutual legal assistance treaty included such a term: "[T]his Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence."¹³¹ The contractual principles category¹³² contemplates the narrow express exception

126. *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702 (1878); *Baldford v. State*, 20 Tex. App. 627, 640-41 (1881); *Iwasawa*, *supra* note 14, at 674 n.228 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244-45 (1796)). RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporter's note 5 (1987), states: "Obligations not to act, or to act only subject to limitations, are generally self-executing." *Id.*

127. *Iwasawa*, *supra* note 14, at 674-75.

128. The Supreme Court considered *Hawes*, 76 Ky. (13 Bush) 697, a "very able" opinion, *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporter's note 5. The court in *Hawes* explained why negative treaty provisions are self-executing:

[When a treaty provides] *that certain acts shall not be done*, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does *not* need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Hawes, 76 Ky. (13 Bush) at 702-03 (emphasis added) (also quoted in RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporter's note 5).

129. In addition, negative treaty provisions presumably would not require any allocation of funds. Such provisions are less likely to run afoul of the Constitution and the separation-of-powers doctrine. See *supra* note 92 and accompanying text.

130. 733 F.2d 909 (D.C. Cir. 1984).

131. *Id.* at 918.

132. See *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *supra* notes 79-88 and accompanying text. The Court, in essence, held that the parties to the treaty had delegated to the executive branch the task of fulfilling a promise, an executory obligation over which the treaty parties did not assume immediate international responsibility. See *supra* part II.B.1.

provision, as exemplified in *Cardenas*, and two other situations: (1) a domestic implementation clause, a fairly common clause that calls upon the treaty parties to enact domestic legislation to implement the treaty, and (2) a reservation by the Senate that expressly renders the treaty or some of its terms non-self-executing.¹³³

To understand domestic implementation clauses requires an analysis of the nature of treaties and the recognition of a misconception about the intent of the parties. Some American courts have discussed whether the treaty parties intended to make a treaty self-executing or whether they intended for individuals to invoke the treaty in United States courts.¹³⁴ This notion of intent, however, is largely a fiction.¹³⁵ Most parties to an international convention are indifferent as to how individual states carry out their international obligations, as long as they do so.¹³⁶

133. If the Senate attaches a reservation to the treaty making it non-self-executing, then the treaty is non-self-executing. This question is one of domestic law, and the Senate may, in ratifying the treaty, determine whether it is self-executing. Blindly attaching such reservations to treaties, however, may have the unwanted effect of encouraging other state-parties not to take their treaty obligations seriously. See NEWMAN & WEISSBRODT, *supra* note 15, at 591 (criticizing reservations depriving human rights covenants of their character as being self-executing); M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1173 (1993) ("The Senate's practice of de facto rewriting treaties through reservations, declarations, understandings, and provisos leaves the international credibility of the United States shaken. "); Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 516-17 (1991) (concluding that "non-self-executing declarations" may undermine treaties domestically and internationally). Aside from the Senate, the president also may play a role in determining whether a treaty is self-executing. Because the courts give deference to the executive in treaty interpretation, the president's statements about the treaty being self-executing or non-self-executing may influence a court's ultimate determination of the question. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 cmt. h (1987).

134. See, e.g., *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466, 468 (5th Cir. 1992) (holding that, because an international agreement governing employment rights of Filipino workers on United States bases did not show that parties intended to confer a private right of action, plaintiff workers may not sue for Christmas bonus notwithstanding treaty provisions stating that "[e]mployees shall receive as a minimum, in addition to their basic wages, . . . [sic] (c) Christmas bonus: [e]quivalent to one-half month's pay") (omission in original).

135. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111(4) cmt. h (observing that the intent of a party other than the United States is irrelevant to the issue of self-execution in the United States); see *supra* note 15.

136. See NEWMAN & WEISSBRODT, *supra* note 15, at 580.

Furthermore, most states cannot ratify a self-executing treaty because, like Great Britain, their constitutional systems forbid it.¹³⁷ When these states are party to a treaty with the United States, they cannot have intended that the treaty be "self-executing."¹³⁸ Since nation-state parties generally do not consider how each state will fulfill its obligations domestically, saying whether the parties intended¹³⁹ or did not intend to provide individuals with rights under the treaty provision misses the mark.

A domestic implementation clause should be examined in this context. Generally, such a clause merely enforces the rule of customary international law that each state is "bound to take every measure necessary to give full effect to the treaty (*pacta sunt servanda*)."¹⁴⁰ A domestic implementation clause usually indicates that the state parties desire that all parties individually take whatever steps necessary to bring the treaty into force in their own country. Such clauses are often directed at countries like Great Britain, which cannot enter into self-executing treaties. Consequently, countries like the United States, which can enter into such treaties, may not need to take any measures to make the treaty effective in domestic courts.¹⁴¹ In addition, a domestic

137. A fairly small number of states have adopted the doctrine of self-executing treaties, including Argentina, Austria, Belgium, Cyprus, Egypt, France, Germany, Greece, Italy, Japan, Luxembourg, Malta, Mexico, The Netherlands, Spain, Switzerland, Turkey, and other European Community countries. Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1, 4 n.14 (1993) (citation omitted).

138. Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 373 (1985) (noting that, because few countries have adopted the doctrine of self-executing treaties and most have "little interest in the mechanics by which other countries fulfill their international obligations under a treaty," trying to determine the "intent of the parties' to most multilateral treaties [has] only marginally greater chances of success than medieval attempts to capture the unicorn"). Aside from the constitutional prohibitions on certain states, "intent analysis" for self-execution purposes does not mean analysis of the parties' actual intent as revealed in the *travaux préparatoires* (preparatory work or drafting history). The intent is largely manifested objectively, that is, gleaned from the language of the treaty itself. See Iwasawa, *supra* note 14, at 655.

139. Of course, the parties may include express language purporting to make a treaty self-executing in the parties' domestic courts. Such language, however, is not a condition precedent to making a treaty term self-executing, and a state's courts would still have to refer to domestic law to determine whether such a clause is self-executing. See *supra* notes 13-18 and accompanying text.

140. Iwasawa, *supra* note 14, at 660.

141. A general implementation clause typically contains language such as the

implementation clause may be limited to some articles of the treaty but not to others.¹⁴² In the absence of more specific language, therefore, a court should not draw the conclusion that domestic implementation clauses render a treaty or treaty provision non-self-executing.

C. Supreme Court Precedent on Treaty Interpretation and on Treaty-Based Jurisdictional Challenges

1. The United States' Approach to Treaty Interpretation

Traditionally, United States courts have construed treaties liberally to effectuate their underlying purpose and to honor the plain meaning of the treaty language: "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them."¹⁴³ United States courts frequently have resorted to the drafting history¹⁴⁴ to glean the purpose¹⁴⁵ and meaning¹⁴⁶ of a treaty term.¹⁴⁷

following: Each state party undertakes to adopt, in accordance with its constitution, the measures necessary to give effect to the provisions of this treaty. *See id.* Some courts have found implementation clauses to be dispositive on the question of a treaty's non-self-execution. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) ("A treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing."), *cert. denied*, 470 U.S. 1003 (1985); *United States v. Postal*, 589 F.2d 862 (5th Cir.) (finding that Articles 17 through 29 of the High Seas Convention rendered Convention non-self-executing), *cert. denied*, 444 U.S. 832 (1979). Such a view, however, misperceives (1) the manner in which states are obligated to carry out international law and (2) the character of self-executing treaties. *See supra* notes 134-42 and accompanying text.

142. *See Iwasawa, supra* note 14, at 660. Accordingly, a treaty may have both non-self-executing provisions and self-executing provisions. *See Warren v. United States*, 340 U.S. 523, 526 n.2 (1951); *Sei Fujii v. State*, 242 P.2d 617, 621 (Cal. 1952) (en banc); *supra* notes 111-20 and accompanying text.

143. *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890); *see Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Jordan v. Tashiro*, 278 U.S. 123 (1928); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).

144. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Kolovrat*, 366 U.S. 187; *Nielsen*, 279 U.S. 47; *Jordan*, 278 U.S. 123; *Tucker*, 183 U.S. at 437.

145. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984) (construing the Warsaw Convention limiting airlines' liability); *Kolovrat*, 366 U.S. 187 (construing the Treaty of Commerce between United States and Serbia); *Ford v. United States*, 273 U.S. 593 (1927) (interpreting anti-hovering treaty between Great Britain

They appear to regard the drafting history of treaties as analogous to the legislative history of statutes¹⁴⁸ and have rejected a literal-minded approach to treaty interpretation.

Justice Scalia, however, has attempted to persuade the Supreme Court to adopt a plain meaning, textualist approach.¹⁴⁹

and the United States prohibiting boarding of vessels to search for then-illegal alcohol except when the vessel was within one hour's travel distance of a party's coastline); *United States v. Rauscher*, 119 U.S. 407 (1886) (interpreting the extradition provisions of the Webster-Ashburton Treaty of 1842 between Great Britain and the United States).

146. Given the president's predominant foreign affairs role, courts, when interpreting a treaty, give great weight to the president's construction. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 326 (1987). The courts, nevertheless, have "final authority" concerning treaty interpretation and may reject the interpretation of the executive branch. *Id. Compare Kolovrat*, 366 U.S. at 194 (stating that courts give executive interpretation "great weight") with *Perkins v. Elg*, 307 U.S. 325, 348 (1939) (declining to follow the Attorney General's opinion).

147. Purpose analysis operates on both the macro and micro levels. The overriding purpose of the treaty helps inform interpretation as does the specific purpose of a particular treaty provision. See HARRY W. JONES ET AL., LEGAL METHOD 345 (1982).

148. Reporter's note 1 of § 325 of the Restatement (Third) of Foreign Relations observes the ease with which our courts have resorted to negotiation history: "United States courts, accustomed to analyzing legislative materials, have not been hesitant to resort to *travaux préparatoires*." See, e.g., *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines*, 466 U.S. 243.

149. In *United States v. Stuart*, 489 U.S. 353 (1989), the Court interpreted a bilateral tax treaty with Canada. The majority quoted language consistently used in prior decisions utilizing drafting history: "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Id.* at 365-66 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982); *Maximo v. United States*, 373 U.S. 49, 54 (1963)). The Court proceeded to apply plain meaning analysis and then to examine extrinsic evidence of the parties' intent, ruling that both the plain meaning and the extrinsic evidence demonstrated that treaty parties intended to permit the IRS Commissioner to direct a United States bank to turn over to Canadian tax authorities bank records of a Canadian national. *Id.* at 366-70.

Concurring, Justice Scalia sharply criticized the majority for resorting to extrinsic evidence, including the preratification legislative history materials when, according to him, the text of the treaty was clear.

The critical question, however, is whether [the intent of the parties] is more reliably and predictably achieved by a rule of construction which credits, when it is clear, the contracting sovereigns' carefully framed and solemnly ratified expression of those intentions and expectations, or rather one which sets judges in various jurisdictions at large to ignore that clear expression and discern a 'genuine' contrary intent elsewhere.

Id. at 371 (Scalia, J., concurring). Justice Scalia would have given "authoritative effect" to extrinsic evidence of the parties' intent only had the treaty provision been

The difficulty with this approach¹⁵⁰ is that it often puts formalism ahead of the parties' actual intentions in making the treaty or statute.¹⁵¹ Even a textualist, like Justice Scalia, will examine legislative or drafting history if the relevant provision is ambiguous as applied to the facts.¹⁵² Determining whether the language is ambiguous as applied, however, is a subjective undertaking that is difficult to carry out without first examining the purpose, legislative or drafting history, and context of the relevant provision and the treaty (or larger statute) of which it is a part.¹⁵³

ambiguous. *Id.* at 373 (Scalia, J., concurring). He believed, however, that the use of preratification legislative history materials was improper because "[t]he question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them or the legislature of a single one of them, thought it agreed to." *Id.* at 374 (Scalia, J., concurring). *But see* Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546 (1989).

150. Interpreting a treaty on the basis of drafting history can likewise be abused, sometimes resulting in judge-made law contrary to the authentic intentions and expectations of the parties. *See, e.g.*, *Sale v. Haitians Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (discussed *infra* note 154); *see also* G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 8 (1951) ("It is evident that this method [of interpreting to further objects, principles and purposes of the treaty], taken beyond a certain point, would involve tribunals in legislative instead of judicial or interpretative functions. ").

151. *See, e.g.*, *Cammetti v. United States*, 242 U.S. 470, 486, 491 (1917) (employing the plain meaning of the words "any other immoral purpose" of the Mann Act, which was aimed at combatting prostitution, to include males who engage in extramarital sexual relations with any woman, whether or not she was a prostitute whom the male transported across state lines). This plain meaning interpretation permitted the government to abuse its power. *See, e.g.*, CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 120-21 (1991) (noting that the Hearst chain of newspapers stopped covering the Senate's Teapot Dome hearings after the Bureau of Investigation, the predecessor to the FBI, threatened to prosecute William Randolph Hearst under the Mann Act for taking his mistress across state lines).

152. *Stuart*, 489 U.S. at 371 (Scalia, J., concurring); *see also* *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S. Ct. 629, 632 (1996) (Scalia, J.) (refusing to apply the plain meaning rule to the term "damages" of Article 17 of the Warsaw Convention governing international air transportation, reasoning that the general meaning of the term was overly broad). In construing this term, Justice Scalia relied instead upon the *travaux préparatoires*, the postratification conduct of the parties, and the context provided by another related article within the Convention. *Id.* at 633-35.

153. Judge Anzilotti of the Permanent Court of International Justice analyzed the problems with the plain meaning rule as follows:

But I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascer-

Justice Scalia has recently joined at least one opinion that rejected the clear plain-meaning interpretation, instead relying heavily on the delegates' debates in negotiating the treaty¹⁵⁴

tained. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention.

WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 165-67 (1962) (quoting Interpretation of the 1919 Convention Concerning Employment of Women During the Night, 1932 P.C.I.J. (ser. A/B) No. 50 (Anzilotti, J., dissenting) (arguing that the article stating that a "[w]oman without distinction of age shall not be employed during the night in any public or private[] undertaking" applied only to women performing manual labor and not to women working as supervisors or managers)); see Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) ("words are inexact symbols"); Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 16 (1939); Charles B. Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509, 519 (1940). But see WESTON ET AL., *supra* note 88, at 142-43 (quoting *Comments of Sir Eric Beckett on the Report of M.H. Lauterpacht (of the Second Commission of the Institute of International Law) on the Interpretation of Treaties*, 1950 *Annuaire de L'Institut de Droit International* 437-39 (endorsing the plain meaning approach and noting that "the task of the court is to interpret the treaty and not to ascertain the intention of the parties")).

154. *Sale*, 509 U.S. 155. Haitians challenged Presidents Bush and Clinton's policy of interdicting Haitian refugees on the high seas, failing to provide them an asylum hearing, and returning them to Haiti, then a country with one of the worst human rights records in the hemisphere. AMNESTY INTERNATIONAL REPORT 1994, at 149, 150 (1994) (noting, among other things, that in 1993 "torture and ill treatment of detainees was widespread"); see also AMNESTY INTERNATIONAL REPORT 1992, at 132 (1992). The U.N. Protocol on Refugees provides as follows: No state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259, 6276 (emphasis added). The majority opinion, which Justice Scalia joined, strained to avoid the plain meaning of "return" and "refouler." The majority concluded that "return" does not mean "return" and relied primarily upon two delegates' comments during the negotiations to contradict both the plain language of the treaty and its underlying purpose, namely, to protect refugees from persecution. See *Sale*, 509 U.S. at 184-87. The authoritative French Dictionary, the French equivalent to Webster's, defines "refouler" as: "1 faire reculer (des personnes) [Ex.] Refouler des envahisseurs." MICRO ROBERT DICTIONNAIRE DU FRANCAIS PRIMORDIAL 912 (1977). Translated, this means: (1) to make (persons) go back [Ex.] To send the invaders back." A French-English dictionary defines "refouler" as follows: "to drive back, repulse; immigrant to turn back. COLLINS ROBERT—CONCISE FRENCH-ENGLISH—ENGLISH-FRENCH DICTIONARY 318 (1981). Substituting "turn back" for "return" gives a stronger reading in favor of the refugees: "No state shall turn back in any manner whatsoever."

That interpretation, unfortunately, also flew in the face of the treaty's purpose.¹⁵⁵ He and the Rehnquist Court as a whole have been criticized for taking a result-oriented approach to treaty interpretation.¹⁵⁶

Thus far, the Court apparently has not accepted Justice Scalia's textualist argument.¹⁵⁷ While recognizing that canons of interpretation establish fine rather than bright lines,¹⁵⁸ American

155. *Sale*, 509 U.S. at 189 (Blackmun, J., dissenting).

156. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994). This commentator observed that the Court somersaults through the treaty canons, excoriating the Court for its strained approach in defiance of the plain meaning in *Sale*. *Id.* at 987-92.

157. By joining in the majority's opinion in *Sale*, Justice Scalia apparently demonstrated his unwillingness to accept the textualist argument in every case in which the plain meaning is clear. See also *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S. Ct. 629, 634-35 (1996) (Scalia, J.) (relying upon extrinsic aids to interpret a treaty term).

158. Karl Llewellyn observed that, when interpreting statutes, courts freely and flexibly use directly opposing canons of construction, such as construing one statute according to its plain meaning and another according to its purpose. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-35 (1960). Llewellyn arranged opposing canons of construction in two columns, labelling one column "thrust" and the other "parry"—e.g., Thrust: "A statute cannot go beyond its text." Parry: "To effect its purpose a statute may be implemented beyond its text." *Id.* at 522. His observations apply equally to interpreting treaties. See, e.g., *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). Justice O'Connor, writing for the majority in *Air France*, relied upon the plain meaning rule in interpreting the word "accident" from Article 17 of the Warsaw Convention, which limits airlines' liability. *Air France*, 470 U.S. at 394, 400. Rejecting plaintiffs' complaint concerning an ear injury, Justice O'Connor concluded that "accident" means an "unusual or unexpected occurrence." *Id.* at 396. She emphasized that "[t]he analysis must begin, however, with the text of the treaty and the context in which the written words are used." *Id.* at 396-97.

A year earlier, however, in *Trans World Airlines*, while interpreting a different article of the same treaty, Justice O'Connor, again writing for the majority, stressed that the purpose of the Warsaw Convention was to limit a carrier's liability for lost cargo and to "set a stable, predictable, and internationally uniform limit." *Trans World Airlines*, 466 U.S. at 256. In determining the purpose, Justice O'Connor relied upon state practice and the treaty's drafting history. *Id.* at 252-53. The treaty linked the extent of air carriers' liability for lost cargo to the value of gold. *Id.* at 247. Avoiding the treaty's plain meaning, the Court approved the lower maximum liability formula not linked to the current price of gold. *Id.* at 251. The dissent stressed the plain meaning of the treaty term, criticizing the Court for "rewrit[ing]" the Convention. *Id.* at 261-62 (Stevens, J., dissenting) ("As with any written document, there 'is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion. '" (alteration in original) (quoting *The Five Per Cent. Discount Cases*, 243 U.S. 97, 106 (1917)); see also Frankfurter, *supra* note 153, at 544 ("In the end, language and external aids, each

courts should resume the tradition of construing treaties liberally, particularly when dealing with the rights of the individual: "Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights which may be claimed under it and the other favorable to them, the latter is to be preferred."¹⁵⁹ To resume this tradition requires not only examining and attempting to give effect to the plain meaning but also, among other things,¹⁶⁰ the drafting history,¹⁶¹ the purpose of the treaty as whole and the treaty provision

accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment.").

159. *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

160. Although a treaty prevails over a prior congressional enactment, *Reid v. Covert*, 354 U.S. 1 (1957), and a prior congressional enactment prevails over a preexisting treaty, *Whitney v. Robertson*, 124 U.S. 190 (1888), the Court has taken pains to construe an apparently conflicting treaty and statute as being consistent with one another, e.g., *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); see *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988). For similar reasons, the Court should apply the same rule of construction to statutes that conflict with customary international law and should construe treaties so as not to conflict with custom: "[A]n 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).

161. The international law of treaty interpretation follows a more restrictive approach than that typically followed by United States courts. The Vienna Convention of the Law of Treaties, which codifies this approach, adopts a hierarchy emphasizing the plain meaning rule and, secondarily, purpose and contextual analysis: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, art. 31.1, 8 I.L.M. 679, 691-92 [hereinafter "Vienna Convention"]; see LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 475-78 (3d ed. 1993) (reproducing Jiménez de Aréchaga, *International Law in the Past Third of a Century*, [1978] *RECEVIL DES COURS* 1, 42-48 (noting the hierarchical approach of the Vienna Convention to treaty interpretation)). The Vienna Convention permits the use of extrinsic materials (drafting history) only when the treaty language is "ambiguous or obscure" or when the plain meaning interpretation would lead to a "manifestly absurd" or "unreasonable" result. Vienna Convention, *supra*, art. 32. The practice of international tribunals, however, does not appear to be as restrictive as the rules themselves would suggest. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 325 reporter's note 1 (observing the fairly widespread use of *travaux préparatoires* by international tribunals).

The United States has not ratified the Vienna Convention on the Law of Treaties. Although stating that the Convention is declaratory of customary international law, the State Department Office of Legal Adviser suggests a broader rule for drafting history

at issue, the context in which the treaty was made, and any postformation conduct of the parties.¹⁶² The Court has observed a similar principle in statutory construction: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"¹⁶³ In applying a nonrestrictive approach to treaty interpretation, American courts are better able to effectuate the authentic intentions¹⁶⁴ of the parties and to recognize rights

than does the plain meaning of the Convention Articles 31 and 32: "As a matter of judicial and executive practice, negotiating history, like the legislative history of a statute, is frequently relied upon in U.S. domestic law and in international law to interpret treaties." CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW 147 (1981) (citing Department of State File Nos. P80 0124-1938, P80 0115-1502).

162. This approach to treaty interpretation draws from the traditional United States approach and that of the draft convention on treaties prepared by the Harvard Research in International Law. The draft's Article 19 provides as follows:

(a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time the interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.

29 AM. J. INT'L L. 937 (Supp. 1935) (quoting Article 19).

163. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (Rehnquist, J.) (quoting with approval *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850). This approach resembles the international-law doctrine of maximum effectiveness:

other things being equal, so to speak, texts are to be presumed to have been intended to have a definite force and effect, and should be interpreted so as to have such force and effect rather than so as not to have it, and so as to have the *fullest* value and effect consistent with their wording (so long as the meaning be not strained) and with *the other parts of the text*.

Fitzmaurice, supra note 150, at 8 (single emphasis in original, double emphasis added); *see also infra* note 430. Another helpful test considers what the parties to the treaty would have regarded as the correct decision if they had addressed the issue *ex ante*. *See HENKIN ET AL., supra* note 161, at 1124.

164. In treaties of a constitutional nature, such as the U.N. Charter, a teleological approach going beyond the intent of the parties to further goals of international order may be appropriate:

[T]he interpretation of the San Francisco instruments will always have to present a teleological character if they are to meet the requirements of world peace, cooperation between men, individual freedom and social progress. The Charter is a means and not an end. To comply with its aims, one must seek the methods of interpretation most likely to serve the

due the individual.

2. *Treaty-Based Challenges to Trial Courts' Personal Jurisdiction*

Two lines of Supreme Court cases deal with self-executing treaties that deprive a domestic court of personal jurisdiction. The first line involves extradition treaties and the specialty doctrine—the doctrine that prohibits the requesting country from prosecuting a fugitive for offenses besides those that the asylum country¹⁶⁵ has designated in its extradition order.¹⁶⁶ The second line involves the Prohibition-era anti-hovering treaties that gave limited rights to the United States Coast Guard to seize on the high seas foreign ships engaged in smuggling alcoholic beverages into the United States.¹⁶⁷

The Court established the specialty doctrine in *United States v. Rauscher*.¹⁶⁸ The United States had asked Great Britain to extradite a ship's officer who allegedly murdered a crew member aboard an American vessel. Upon being extradited, however, the officer was not charged with murder but with assault and infliction of cruel and unusual punishment upon a crew member. The Webster-Ashburton Treaty between the United States and

natural evolution of the needs of mankind.

HENKIN ET AL., *supra* note 161, at 479 (quoting Advisory Opinion Concerning Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 23 (Azevedo, J., dissenting)); *see also id.* at 479 (quoting the decision of the European Court of Human Rights in the Deumeland Case, 86 I.L.R. 376, 408 (1986), for the proposition that the European Convention on Human Rights should be construed "in the light of modern day conditions obtaining in the democratic societies of the Contracting States and not solely according to what might be presumed to have been in the minds of the drafters of the Convention"); MYRES S. MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* (1967); *cf.* *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (applying the rubric of evolving standards of decency to hold that the Eighth Amendment bars the execution of murderers under the age of sixteen). *But see* Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?* 65 AM. J. INT'L L. 358 (1971).

165. The "requesting state" is the country seeking extradition. The "requested state" or "asylum state" is the country holding the fugitive, the country from whom extradition is sought.

166. 1 BASSIOUNI, *supra* note 94, at 354-64.

167. *See infra* notes 200-28 and accompanying text.

168. 119 U.S. 407 (1886).

Great Britain made murder, but not this lesser crime, an extraditable offense.¹⁶⁹ The Court ruled that the United States had violated the treaty by trying the officer on a charge different from that upon which Great Britain had granted extradition. The Court implicitly concluded that the trial court lacked personal jurisdiction, reversed the conviction, and ordered that the defendant be given the opportunity to return to the asylum state.¹⁷⁰ The Court reasoned that the detailed procedures established by the treaty, the language of the preamble restricting extradition to "certain cases," the probable policies underlying that restriction, and the treaty language itself demonstrated that the purpose of the provision was to limit extradition to the seven enumerated offenses.¹⁷¹

Nothing in the Webster-Ashburton Treaty, however, suggests that the parties intended to grant individual fugitives any rights, limits the crimes on which the requesting country may charge the fugitive, or hints about a remedy in the event of a treaty violation.¹⁷² The treaty¹⁷³ commands what the parties should do—for example, surrender persons accused of murder or assault to commit murder—but is silent concerning what the parties may not do. It does not expressly prohibit trying an extradited person for other than the extraditable offenses.¹⁷⁴ The drafters could have inserted an express provision in the treaty: "The competent authorities of the requesting state may charge, try, and sentence the fugitive only for crimes for which she is extradited."¹⁷⁵

169. The treaty provides:

[T]he [parties] shall, upon mutual requisitions by them, deliver up to justice all persons who, being charged with the crime of [1] murder; or [2] assault with intent to commit murder, or [3] piracy; or [4] arson; or [5] robbery; or [6] forgery, or the [7] utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other.

Id. at 410-11 (quoting the Webster-Ashburton Treaty between the United States and Great Britain) (emphasis added).

170. *Id.* at 422-23.

171. *Id.*

172. See *supra* note 169 (quoting the relevant treaty language).

173. *Rauscher*, 119 U.S. at 422-23.

174. The dissent stressed this point. *Id.* at 434 (Waite, C.J., dissenting).

175. Cf. *Cosgrove v. Winney*, 174 U.S. 64, 66 (1899) (finding that extradition treaty between United States and Canada included explicit language recognizing right of

Like most extradition treaties, the Webster-Ashburton Treaty was made primarily to benefit the two parties, not the fugitives to be extradited.¹⁷⁶ The Court in *Rauscher* nevertheless inferred that the government had violated the defendant's rights by charging him with a nonextraditable crime,¹⁷⁷ concluding that the object and purpose of the treaty provided rights residing in the individual extradited¹⁷⁸ as well as in the states-parties.¹⁷⁹ *Rauscher* was thus a direct beneficiary of the Webster-Ashburton Treaty, but not necessarily an intended beneficiary¹⁸⁰ Fur-

specialty).

176. 1 BASSIOUNI, *supra* note 94, at 319.

177. More contemporary court opinions have divided on whether the asylum state must protest the prosecution's filing additional charges for the doctrine of specialty to apply. A full discussion of the question of protests as necessary for standing and the related question of waivers are beyond the scope of this Article. See Michael B. Bernacchi, Note, *Standing for the Doctrine of Specialty in Extradition Treaties: A More Liberal Exposition of Private Rights*, 25 LOY. L.A. L. REV. 1377, 1386 nn.72-73 (1992) (collecting the leading cases requiring asylum state protest—*United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir.) (finding that only asylum state may complain of treaty violation), *cert. denied*, 493 U.S. 895 (1989); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985) (holding that right of specialty is held by the asylum state), *cert. denied*, 475 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 295 (1994); *United States v. Paroutian*, 299 F.2d 486, 490 (2d Cir. 1962) (ruling that the asylum state, not the fugitive, possesses right of specialty)—and allowing defendant the right to raise objection—*United States v. Diwan*, 864 F.2d 715, 721 (11th Cir.) (holding that defendant may raise whatever objections asylum state may raise), *cert. denied*, 492 U.S. 921 (1989); *United States v. Thurion*, 813 F.2d 146, 151 & n.5 (8th Cir. 1987) (ruling that defendant has right to raise treaty violations); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (allowing a fugitive to assert extradition treaty violations), *cert. denied*, 479 U.S. 1009 (1986)); *supra* note 280; see also *United States v. Sensi*, 664 F. Supp. 566, 570 (D.D.C. 1987) (holding that, as supreme law of the land, specialty provision may be asserted by fugitive), *aff'd on other grounds*, 879 F.2d 888 (D.C. Cir. 1989).

178. The Court expressly rejected a lower court's holding in another case that only the state parties can invoke the treaty in the event of a violation. The lower court held:

[W]hile abuse of extradition proceedings, and want of good faith in resorting to them, doubtless constitute a good cause of complaint between the two governments, such complaints do not form a proper subject of investigation in the courts, however much those tribunals might regret that they should have been permitted to arise.

United States v. Rauscher, 119 U.S. 407, 424-25 (1886) (quoting Judge Benedict's reasoning in another extradition case interpreting the Webster-Ashburton Treaty) (alteration in original).

179. *Id.* at 422.

180. *Id.* at 431. A defendant may not be tried for other charges "until a reasonable

thermore, the Court expressly rejected the argument that a defendant's only remedy was to seek the intervention of "the Executive Departments of the respective governments."¹⁸¹

Recognizing the rights of individual prisoners to invoke the treaty, according to the Court, "relieve[d]" the "tension" between the executive branch and our state courts.¹⁸² Such federal interference in state court proceedings causes resentment, which is eliminated by providing the individual defendant the right to assert the treaty in all cases.¹⁸³ The Court also believed that the rule of specialty encouraged asylum states to surrender defendants.¹⁸⁴ If asylum states learned that extradited persons are routinely tried for crimes other than those for which they were extradited, then the requested state might, in the future, be more reluctant to deliver requested fugitives.¹⁸⁵ Indeed, shortly before the Court decided *Rauscher*, Great Britain refused to deliver a fugitive, asserting those precise grounds.¹⁸⁶

Rauscher reflects the long-standing recognition that extradition treaties are self-executing.¹⁸⁷ It exemplifies the kind of case that does not pose separation-of-powers concerns. Extradition has a

time and opportunity have been given him, after his release or trial upon such [charges upon which he has been extradited], to return to the country from whose asylum he had been forcibly taken under those proceedings." *Id.* at 430. The Court relied upon treatises and a line of state and federal cases. *Id.* at 431.

181. *Id.* at 426. *Rauscher* repudiated the lower court's position and held that *individuals* as well as state parties have the right to invoke the treaty. *Id.*, see *supra* note 17.

182. *Rauscher*, 119 U.S. at 430.

183. *Id.*

184. The Court in *Rauscher* also noted that two acts of Congress apparently supported its position. *Id.* at 423. The first, codifying extradition practice, authorized the Secretary of State to deliver up to a foreign government a fugitive "to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly." *Id.* (quoting United States Rev. Stat. § 5272). The second statute, also dealing with extradition, allowed the President to take fugitives delivered up to the United States and to provide for their safekeeping "until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition." *Id.* (quoting United States Rev. Stat. § 5275). Neither of these statutes, however, prohibits the trial of the fugitives surrendered to the United States for other crimes. The Court indicated that it used the statutes solely to bolster its holding in construing the treaty itself. *Id.*

185. *Id.* at 419.

186. *Id.* at 415-16.

187. See 1 BASSIOUNI, *supra* note 94, at 74-76.

lengthy history of being regulated by the judiciary,¹⁸⁸ and determining the rights of those accused of a crime is exclusively within the judicial power.¹⁸⁹ Since the early years of the Republic,¹⁹⁰ courts have interpreted extradition treaties and have applied them to individuals. The courts thus have considerable experience in determining whether an accused is properly before them and properly charged.¹⁹¹

Rauscher is further illuminated by *Ker v. Illinois*.¹⁹² In *Ker*, the United States hired a messenger to go to Peru to deliver extradition papers requesting Ker's extradition.¹⁹³ Upon arrival, the messenger did not present the extradition papers to the proper authorities but instead forcibly abducted Ker and returned him to the United States.¹⁹⁴ Ker was subsequently indicted, tried, and convicted of larceny and embezzlement.¹⁹⁵ Ker challenged the lower court's personal jurisdiction, asserting the illegality of his capture and removal from Peru.¹⁹⁶ In rejecting Ker's arguments, the Supreme Court reasoned that having physical custody of the defendant sufficed to establish personal jurisdiction, regardless of the manner in which that custody was obtained.¹⁹⁷ The Court distinguished *Rauscher*, noting that the government had violated a treaty¹⁹⁸ in that case, whereas the *Ker* abduction, though ille-

188. *Id.* at 71-101.

189. *See* *United States v. Robins*, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175) (concluding that extradition treaties are self-executing and holding that Article III of the Constitution extended the courts' judicial power to extradition treaties despite the absence of congressional legislation on extradition). Congress did not enact legislation governing extradition until 1848. 1 BASSIOUNI, *supra* note 94, at 72.

190. 1 BASSIOUNI, *supra* note 94, at 71-72.

191. *See id.*

192. 119 U.S. 436 (1886). *Ker* was decided the same day as *Rauscher*. The same Justice wrote the majority opinion in both cases. *Ker* is usually linked with *Frisbie v. Collins*, 342 U.S. 519 (1952) ("The Ker-Frisbie Doctrine"). In *Frisbie*, the defendant was kidnapped in Illinois and brought to Michigan, where he was likewise arrested, tried, and convicted. *Id.* at 520. The result was the same as in *Ker*; the illegality of the kidnapping did not defeat the trial court's personal jurisdiction over the defendant. *Id.* at 522.

193. *Ker*, 119 U.S. at 438.

194. *Id.*

195. *Id.* at 438-39.

196. *Id.* at 439.

197. *Id.* at 440.

198. *Id.* at 443. *Ker* also has been distinguished on the ground that *Ker* involved a

gal in Peru, did not violate any treaty with that country¹⁹⁹

Aside from the specialty cases, individuals have used the Prohibition-era anti-hovering treaties to challenge a trial court's personal jurisdiction. In *Cook v. United States*,²⁰⁰ Justice Brandeis, writing for the Court, relied upon the history leading up to such a treaty to infer a remedy in favor of a private individual.²⁰¹ Before the treaty, the United States Coast Guard had been boarding and seizing foreign vessels, cargoes, and crews outside the then-recognized international three-mile limit.²⁰² The vessels had been carrying liquor to smuggle into the United States during Prohibition.²⁰³ The Court noted that Great Britain had protested United States interdictions strenuously, asserting that the United States was violating international law and that continuing this policy would create "a very serious situation."²⁰⁴

In response to the British protests, the two countries began to negotiate a treaty to resolve their differences.²⁰⁵ Britain rejected United States proposals for a mutual twelve-mile limit.²⁰⁶ After further negotiations, the United States accepted, with slight variations, Britain's counterproposal: the limit would equal one hour's traveling distance measured by the maximum speed of the seized vessel.²⁰⁷ In *Cook*, the vessel was boarded 11.5 miles from the

private kidnapping—the United States had not authorized the party's abduction, whereas, for example, the United States, through the DEA, did authorize the abduction of Alvarez-Machain. See *United States v. Alvarez-Machain*, 504 U.S. 655, 682 (1992) (Stevens, J., dissenting).

199. *Ker*, 119 U.S. at 443. Nor did the abduction violate the Constitution or any United States statute. *Id.* at 444.

200. 288 U.S. 102 (1933).

201. *Id.* at 112-22.

202. *Id.* at 113.

203. *Id.*

204. *Id.* at 115.

205. *Id.* at 115-16.

206. *Id.* at 116.

207. Article II(1) and (2) of that treaty provides as follows:

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or

American coast.²⁰⁸ The vessel was capable of traveling ten miles per hour.²⁰⁹ Hence, the seizure took place outside the agreed upon distance. The ship's master was subsequently fined \$14,286.18 for violating United States statutes prohibiting the importation of liquor.²¹⁰ He appealed.²¹¹

The issue on appeal was whether the district court had jurisdiction over the vessel and the ship's master despite the fact that the vessel was taken in violation of the treaty.²¹² The treaty language provided for compensation but said nothing expressly about a defense to a fine. Nevertheless, the Court inferred such a term from the treaty language, concluding that the ship's master had the right to assert the treaty and that the government's

possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

Convention Between the United States and Great Britain for Prevention of Smuggling of Intoxicating Liquors, May 22, 1924, U.S.-Great Britain, 43 Stat. 1761-62 (1924) [hereinafter *Anti-Hovering Treaty*]. Article IV of the treaty, which dealt with claims for compensation, provided as follows:

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this Treaty or on the ground that it has not been given the benefit of Article III [permitting passage of liquor through the U.S. destined for a foreign port or for use on board] shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th of August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

Id. at 1762.

208. *Cook*, 288 U.S. at 107.

209. *Id.*

210. *Id.* at 108.

211. *Id.* at 108-09.

212. *See supra* note 207 and accompanying text.

violation of the treaty deprived the trial court of personal jurisdiction:

The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize, at the place where the seizure was made. The objection is that the Government itself lacked power to seize since by the Treaty it had imposed a territorial limitation upon its own authority. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.²¹³

This interpretation helped the United States meet its treaty obligations with Great Britain. The treaty itself arose because Britain sharply protested the United States' interdicting British vessels on the high seas. Had the Court upheld the trial court's jurisdiction, British protests presumably would have escalated because, not only would the United States have disregarded the international three-mile limit, but it also would have violated an agreement between the parties to resolve this specific problem. Furthermore, the Court's interpretation is in accord with one of the Supremacy Clause's purposes—avoiding friction with other governments. By making treaties the supreme law of the land and thereby giving individuals, including foreigners, the right to raise treaty rights in American courts, the Framers hoped to reduce potential conflict with the foreigners' home countries.²¹⁴ The Court in *Cook* expressly foresaw this potential conflict²¹⁵ and prevented it from developing.

Cook posed no separation-of-powers concerns because it dealt solely with a prosecution brought by the executive branch. The master who had been fined was a direct beneficiary of the treaty terms and probably an intended beneficiary, but the Court did not explore whether the parties to the treaty intended to grant persons in that class the right to challenge a court's jurisdiction.

213. *Cook*, 288 U.S. at 121-22 (citing, in comparison, *United States v. Rauscher*, 119 U.S. 407 (1886)).

214. See *supra* notes 20-74 and accompanying text.

215. *Cook*, 288 U.S. at 115.

The Court relied upon *Ford v. United States*²¹⁶ to find the treaty self-executing.²¹⁷

In *Ford*, the defendants—ship officers—sought to oust the court's jurisdiction, arguing that the government violated the same anti-hovering treaty in seizing the vessel and prosecuting them.²¹⁸ The defendants claimed that the vessel was seized in international waters well beyond the one-hour traveling distance.²¹⁹ The treaty language, however, did not expressly give an individual apprehended in violation of the treaty a right to challenge the personal jurisdiction of a United States District Court or of any other court.²²⁰ The vessel alone was given a remedy, that being only an arbitral claim for "the improper or unreasonable exercise of the rights conferred by Article II of this Treaty or on the ground that it has not been given the benefit of Article III."²²¹

The government relied upon *Ker v. Illinois*.²²² The Supreme Court, however, distinguished *Ker*, concluding that the anti-hovering treaty provided a defense to individuals wrongfully seized and arrested.²²³

The Solicitor General answers, on the authority of *Ker v. Illinois*, that an illegal seizure would not have ousted the jurisdiction of the court to try the defendants. But the *Ker* case does not apply here. It related to a trial in a state court, and this Court found that the illegal seizure of the defendant therein violated neither the Federal Constitution, nor a federal law, nor a treaty of the United States, and so that the validity of their trial after alleged seizure was not a matter of federal cognizance. Here *a treaty of the United States is directly involved*, and the question is quite different.²²⁴

216. 273 U.S. 593 (1927).

217. *Cook*, 288 U.S. at 119 (citing *Ford*, 273 U.S. 593, and a letter from the Secretary of State to the House Committee on foreign affairs to the same effect).

218. *Ford*, 273 U.S. at 600.

219. *Id.* at 605-06.

220. *See id.* at 599.

221. *Id.* at 609 (quoting Article IV of the treaty).

222. 119 U.S. 436 (1886); *see supra* notes 192-99 and accompanying text.

223. *See Ford*, 273 U.S. at 606.

224. *Id.* at 605-06 (emphasis added) (citations omitted).

The Court implied that the officers could assert the treaty as a defense to the district court's criminal jurisdiction.²²⁵ The officers were direct beneficiaries of the treaty provision prohibiting seizure of British ships. They were not, however, necessarily intended beneficiaries.²²⁶

Rauscher, *Ford*, and *Cook* teach that defendants may trump the *Ker-Frisbie* doctrine and oust the trial court of personal jurisdiction when agents of the United States have illegally seized such defendants from abroad in violation of a treaty.²²⁷ In addition, *Rauscher* implicitly held that a direct beneficiary of a treaty may invoke that treaty as a defense and that there need not be any showing that the defendant was an intended beneficiary or that the treaty itself expressly granted individuals in the defendant's class any rights.²²⁸ The *Ford* facts and holding give rise to a similar inference.

225. See *id.* at 606.

226. The Court held, however, that the government did not violate the treaty in arresting the defendants, for the trial court, as the proper finder of fact on this issue, determined that the vessel was within the one-hour travel distance from the California coast. *Id.* at 605. The Court also ruled that the treaty did not, by implication, give individuals on the ship immunity from criminal proceedings. *Id.* at 610-11.

227. Although concluding that the DEA kidnapping did not violate the extradition treaty with Mexico, the Court in *Alvarez-Machain* did acknowledge that, had the kidnapping in fact violated the treaty, the *Ker-Frisbie* doctrine would not have applied. *United States v. Alvarez-Machain*, 504 U.S. 655, 662 (1992); see also Jacques Semmelman, *Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Abroad Extraterritorially: The Ker-Frisbie Doctrine Reexamined*, 30 COLUM. J. TRANSNAT'L L. 513, 525-29 (1992). Many lower federal courts, however, have gone out of their way to avoid recognizing defenses based on treaty. In *United States v. Toscanino*, 500 F.2d 267, 269-70, 278-80 (2d Cir. 1974), the court rejected an application of the *Ker-Frisbie* rule and concluded that the trial court lacked personal jurisdiction, ruling that the state-sponsored kidnapping, coupled with torture, beatings, and ill treatment (1) shocked the conscience and violated due process and (2) violated international treaty. The international-law prong of that decision, however, has not been followed. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 433 reporter's note 3 (1987) (citing *United States v. Darby*, 744 F.2d 1508 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981); *United States v. Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974)).

228. See *Rauscher v. United States*, 119 U.S. 407, 432-33 (1886).

III. PROPOSED TEST FOR ASSERTING A TREATY DEFENSIVELY

A. *Affirmative Versus Defensive Treaty Invocation*

Authorities have differed on the appropriate standards for implying a private cause of action for damages under a treaty. One approach is to do so when the treaty passes the test for implying a right of action under a federal statute.²²⁹ The Court, however, has made such an implication increasingly difficult. The plaintiff must now show not only that Congress intended especially to benefit the class of persons of which she belongs but also that Congress intended to create such a cause of action.²³⁰ Another commentator has suggested that treaties are more akin to constitutional provisions and that, consequently, the less restrictive criteria for implying rights of action from the Constitu-

229. See Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 401-02 (1988) (arguing that human rights treaties pass the *Cort* test for implication of causes of action).

230. The Court has followed an increasingly narrow path in implying rights of action. Under *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916), and *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court implied a private right of action "whenever the statute in question appeared to fall short of attaining congressional goals." Brett Witter, Note, *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990): *The Sixth Circuit Gets Sheepish on Foreign Corrupt Practices Act Enforcement*, 5 TRANSNAT'L LAW. 533, 548 n.121 (1992). In 1975, however, the Court restricted the bases upon which a cause of action could be implied from a federal statute, establishing the following criteria:

[1][I]s the plaintiff "one of the class for whose *especial* benefit the statute was enacted[?]" [2][I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? [3] [I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [4][I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975). Over the next seven years, the Court again made the test more difficult, emphasizing the second *Cort* factor, which required plaintiffs to show that Congress had intended to grant individuals in plaintiffs' class a private cause of action. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374 (1982); *California v. Sierra Club*, 451 U.S. 287, 293-97 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The Supreme Court has since further restricted the test. See *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527 (1989); Henry P. Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 246 n.91 (1991) ("The four factors have been reduced to the question of legislative intent. ").

tion should apply.²³¹ Some argue, however, that a private right of action should be rejected altogether, unless the treaty expressly grants such a right.²³²

Asserting a treaty-based cause of action for damages, however, fundamentally differs from invoking a treaty as a defense to a governmental action. The difference rests on the interaction between the Supremacy Clause, the Take Care Clause, the nature of defenses, and the judiciary's role under Article III of the Constitution. The Supremacy Clause makes treaties the law of the land, as are federal statutes and constitutional provisions. Under the Take Care Clause,²³³ the Constitution requires the executive to enforce the law, which includes legally ratified treaties. If the treaty is self-executing, the executive is obligated to enforce the treaty domestically as well as internationally. Besides making treaties law, the Supremacy Clause makes them superior to

231. Vázquez, *supra* note 63; see *Carlson v. Green*, 446 U.S. 14, 16, 18-19 (1980) (upholding a *Bivens*-type remedy as available under the Eighth Amendment when federal prison officials deliberately interfered with a prisoner's medical needs and rejecting the government's argument that Congress had preempted an implied damage action through the 1974 amendments to the Federal Tort Claims Act); *Davis v. Passman*, 442 U.S. 228, 230-35 (1979) (implying a cause of action for damages under the Fifth Amendment in favor of a staff member who alleged that her employer, a Congress member, had engaged in gender-based discrimination); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971) (holding that, when the "case involves no special factors counselling hesitation in the absence of affirmative action by Congress," an individual whose home and person were searched by federal agents in violation of the Fourth Amendment had stated a cause of action for damages). *But see* *Schweiker v. Chilicky*, 487 U.S. 412, 420 (1988) (holding that wrongful termination of Social Security benefits did not result in an implied right of action to recover damages for a violation of due process); *Bush v. Lucas*, 462 U.S. 367, 386 (1983) (holding that federal personnel matters demanded Court deference to congressional expertise, in that a remedial scheme provided by Congress allowed "meaningful remedies for employees who may have been unfairly disciplined for making critical comments," while acknowledging that the congressional remedy was not as effective as the *Bivens* remedy).

232. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). *But see* *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (recognizing a cause of action under the Alien Tort Statute on the ground that customary international law bars torture and is synonymous with "the law of nations"); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

233. Section 3 of Article II of the Constitution provides in relevant part that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

inconsistent state laws and previously enacted inconsistent federal statutes. Under *Marbury v. Madison*,²³⁴ one of the most significant functions of the judiciary is to "say what the law is,"²³⁵ including, except for political questions, defining the executive's obligations owed to individuals under the Constitution, treaties, and federal statutes.²³⁶

If, for example, a treaty deprived a court of personal jurisdiction, the Supremacy Clause would make this treaty rule superior to previously enacted inconsistent federal statutes and previously decided inconsistent federal case law. Assume that enforcing the treaty rule does not rise to the level of a political question. Then, under the Take Care Clause, the executive is obliged to comply with the treaty rule. If the executive nevertheless violates the rule, and if that violation deprives the court of personal jurisdiction, then the court should dismiss. If, however, the trial court denies the motion to dismiss and ultimately issues a judgment of conviction, then the judgment is procedurally defective.²³⁷ A treaty depriving a court of personal jurisdiction for state-sponsored kidnapping may not necessarily, however, either expressly or impliedly grant the kidnap victim a cause of action for false

234. 5 U.S. (1 Cranch) 137 (1803).

235. *Id.* at 177. In an earlier part of the opinion, the Court also noted that the "province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive or executive officers, perform" discretionary duties. *Id.* at 170.

236. *See id.* at 170-71.

237. "The lone exception to the general rule is that the defendant can successfully challenge the court's jurisdiction over his person if he is before the court in violation of an international treaty." Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 ST. JOHN'S L. REV. 551, 557 n.25 (1993) (quoting *United States v. Vreeken*, 603 F. Supp. 715, 717 (D. Utah 1984), *aff'd*, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987)). Some commentators indicate that a judgment obtained without personal jurisdiction is void; others believe that such a judgment should be considered voidable. *Cf.* JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 180, 190 (2d ed. 1993) (citing *Wyman v. Newhouse*, 93 F.2d 313, 315 (2d Cir. 1937) (holding that fraud affecting personal jurisdiction amounts to lack of jurisdiction), *cert. denied*, 303 U.S. 664 (1938), and *Blandin v. Ostrander*, 239 F. 700, 702-03 (2d Cir. 1917) (holding that fraudulently inducing a defendant into the jurisdiction to be served was insufficient to establish personal jurisdiction), for the proposition that fraudulently obtaining personal jurisdiction in a civil matter deprives the court of jurisdiction but citing *Commercial Mutual Accident Co. v. Davis*, 213 U.S. 245 (1909), for the proposition that, in such cases, "jurisdiction exists, but the court should decline to exercise it").

imprisonment. The defendant/kidnap victim is, however, entitled to invoke the treaty to help the court properly determine what the law applicable to his case is, namely, that it denies the court personal jurisdiction.

Professor Vázquez explains why the threshold for defensively asserting a treaty is lower than that for affirmatively seeking to imply a treaty-based private right of action.

A right of action is not necessary to invoke a treaty as a defense. For example, it is clear that the Framers intended that a treaty would nullify any inconsistent state law, and that a treaty supersedes an earlier federal statute. Thus, a defendant being prosecuted or sued under a state or prior federal law that is inconsistent with a treaty is entitled to invoke the treaty in court to nullify the state or federal law without having to show that the treaty confers a private right of action. Moreover, the Due Process Clause ordinarily requires that a government deprivation of property or liberty be preceded by a hearing. Thus, even if the beneficiary of a treaty-based primary right were deemed not to possess a right of action, he would nevertheless be free to resist a deprivation of liberty or property that violates the treaty and to invoke the treaty as a defense to a government coercive proceeding. The Supremacy Clause, by nullifying official action, and the Due Process Clause, by requiring a hearing at which the action can be challenged (either offensively or defensively), furnish the legal sanction that a strict sanctionist would consider an essential attribute of a law and a legal right.²³⁸

The substantive standards for invoking a treaty as a defense are therefore different from and less demanding than those concerned with implying a private cause of action for damages from a treaty. This comparison necessarily begs the questions: how much lower are the standards and what standards ought to be applied to the defensive invocation of treaties? Standing doctrine was not in existence at the time the Constitution was signed and ratified,²³⁹ but whether a defendant may invoke a

238. Vázquez, *supra* note 63, at 1143-44 (footnotes omitted).

239. Cf. Michael S. Gilmore, *Standing Law in Idaho: A Constitutional Wrong Turn*, 31 IDAHO L. REV. 509, 539-41 (1995) (noting that the standing doctrine originated in 1923 in *Frothingham v. Mellon*, 262 U.S. 447 (1923), even though the Court did not

treaty appears to be a standing question. In American law, a consensus has not formed concerning what the standing rules are or should be; the Court has been criticized for manipulating the standing rules to advance an ideological agenda.²⁴⁰ There does appear to be general agreement, however, that the "case or controversy" requirement of Article III of the Constitution demands that the party show that the government has caused him an "injury in fact."²⁴¹ Aside from injury in fact, the Court also has imposed a prudential requirement on plaintiffs that attempt to invoke the power of the courts so that the judiciary may "avoid deciding questions of broad social import where no individual rights would be vindicated and limit access to the federal courts to those litigants best suited to assert a particular claim."²⁴²

For the reasons mentioned above, defensive invocation of a treaty or statute should necessarily lessen the prudential requirements.²⁴³ When the government has already invoked the power

yet use the term "standing").

240. See, e.g., Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548 (1993); John C. Yang, *Standing in the Doorway of Justice*, 59 GEO. WASH. L. REV. 1356 (1991); David A. Domansky, Note, *Abusing Standing: Furthering the Conservative Agenda*, 29 WM. & MARY L. REV. 387 (1988).

241. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973). Some commentators, however, have suggested that the Court has defined injury in fact restrictively, making it impossible for any plaintiff to challenge certain unconstitutional governmental action. See, e.g., Donald L. Doernberg, "We the People": *John Locke, Collective Constitutional Rights, and Standing To Challenge Government Action*, 73 CAL. L. REV. 52, 92-93 (1985).

242. CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* 79 (5th ed. 1994) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979)).

243. PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 184 (2d ed. 1973) ("When a defendant in an enforcement proceeding resists the imposition of state force upon him, he clearly has standing in every sense to assert in his defense any claimed constitutional rights of his own."). Compare *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (holding that physicians lacked standing in a civil action to challenge a Connecticut birth control statute because they invoked their patients' rights instead of their own) with *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (recognizing that physicians convicted as accessories for violating the same Connecticut birth control statute had standing to raise the constitutional rights of their patients). In *Griswold*, the Court stated:

In [*Tileston*] we thought that the requirements of standing should be strict,

of the court, the litigant's suitability to invoke the claim is not really in issue, and the possibility of champerty and of litigants using the courts to further ideological questions that are beyond the power of the judiciary is decreased considerably. The prudential requirement springs to a great extent from separation-of-powers concerns.²⁴⁴ In defensive-treaty-invocation cases, however, separation of powers usually does not pose a problem.²⁴⁵ Professor Vázquez notes that treaties impose obligations on governments much in the same way that statutes impose obligations on administrative agencies: "[L]ike statutes imposing duties on administrative agencies, treaties by their nature impose duties on the state. Standing doctrine, which identifies who may enforce statutes that impose duties on government agencies, addresses precisely the same question as this branch of the 'self-execution' question."²⁴⁶ He argues that these standing rules

lest the standards of "case or controversy" in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.

Id., see *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Baird*, the Court ruled that a birth control advocate could assert the rights of unmarried singles and therefore had standing to challenge his conviction for distribution of anti-spermicidal foam under a birth control law restricting the sale of contraceptives. *Id.* at 446. The Court noted that the statute criminalized distribution, not use; therefore, unmarried singles could not have challenged the statute on their own. *Id.* But see *Rakas v. Illinois*, 439 U.S. 128, 133-35 (1978) (defining Fourth Amendment rights narrowly to limit the ability of criminal defendants to assert such rights); *infra* note 276 (discussing *Rakas* and its progeny). In the context of a criminal prosecution, the defendant must show that she has suffered an injury in fact to raise a treaty or other international law claim. See *United States v. Berrigan*, 283 F. Supp. 336, 341 (D. Md. 1968) (finding that Vietnam War protesters, who were accused of damaging draft records, lacked standing to invoke the Nuremberg Principles because they had not been subjected to illegal orders), *aff'd*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970); see also *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966) (holding that an allegation that the US was conducting the war in Vietnam in violation of several treaties was not a defense in a case in which the defendant was prosecuted for failure to report for induction into the armed services), *cert. denied*, 386 U.S. 972 (1967).

244. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." WRIGHT, *supra* note 242, at 78 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

245. See *supra* note 94 and accompanying text; *infra* part IV.C.1.

246. Vázquez, *supra* note 63, at 1135.

should apply to affirmative causes of action under a treaty²⁴⁷ The text and history of the Supremacy Clause, the Take Care Clause, and Supreme Court precedent suggest that a generous standard applies for defensive invocation of a treaty²⁴⁸ The Court has developed such a standard for challenging administrative regulations, the zone-of-interest test, and it should apply to defensive invocation of a treaty²⁴⁹

The Court developed the zone-of-interest test in cases interpreting the Administrative Procedure Act (APA), which grants standing to a person "aggrieved by agency action within the meaning of a relevant statute."²⁵⁰ In *Association of Data Processing Service Organizations v. Camp*,²⁵¹ the Court had to decide which classes of persons were so "aggrieved."²⁵² A group of data processors sued the Comptroller of the Currency for permitting a bank to handle data processing for banks and other businesses.²⁵³ Section 4 of the Bank Service Corporation Act of 1962²⁵⁴ forbade banks from "engag[ing] in any activity other than the performance of bank services for banks."²⁵⁵ Arguing that the

247. *Id.* at 1137.

248. *See infra* text accompanying notes 277-83.

249. *See infra* text accompanying notes 250-61.

250. 5 U.S.C. § 702 (1994).

251. 397 U.S. 150 (1970).

252. *Id.* at 153-56.

253. *Id.* at 151.

254. Pub. L. No. 87-856, 76 Stat. 1132 (codified at 12 U.S.C. § 1864) (amended 1982).

255. *Id.* § 4. *Data Processing* has received scholarly criticism, particularly for making injury in fact the cornerstone for standing. *See, e.g.,* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 185 (1992). *But see* Carl Tobias, *Standing To Intervene*, 1991 WIS. L. REV. 415, 425 (noting the inadequacy of the injury-in-fact test but observing that *Data Processing's* "arguably within the zone" requirement functioned pragmatically as a feasible, liberal threshold test"). Courts also have criticized the test. *See, e.g.,* *American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 51 (D.C. Cir. 1983) (noting the difficulty of applying the test). In *Webster*, the court also criticized a trend in lower federal courts to restrict the test:

First, a test that focuses on whether Congress *intended* to protect or benefit certain interests may be stricter than the Supreme Court's statement that the complainant's interest need only be "*arguably* within the zone of interests to be protected or regulated by the statute in question." Second, it may run counter to the Court's purpose for developing the "zone" test—to enlarge the class of people with standing—to deny standing to parties who have both suffered concrete injury caused by agency action and satisfied other prudential concerns, solely because a

data processors lacked standing, the Comptroller correctly noted that Congress never intended section 4 to benefit data processors or other nonbank competitors.²⁵⁶ Rejecting the Comptroller's position and the so-called legally-protected-interest test, the Court refused to read the APA's "generous review provisions" narrowly.²⁵⁷ Furthermore, the Court held that the Act should be construed "not grudgingly but as serving a broadly remedial purpose."²⁵⁸

In *Data Processing*, the Court established the zone-of-interest test.²⁵⁹ The test required the plaintiff to demonstrate not only that he was adversely affected or aggrieved but also that "the interest sought to be protected by the complainant [was] *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."²⁶⁰ The Court

search for snippets of congressional language about their particular interest reveals nothing determinative.

Id. (citing *Data Processing*, 397 U.S. at 153); see also *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 954-55 (D.C. Cir. 1982) (Ginsburg, J., concurring) (criticizing the D.C. Circuit's decisions that restricted the zone-of-interest test to require an indication of legislative intent, "however slight" to benefit the class of which the plaintiff is a member). Then-Judge Ginsburg quoted with approval *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80-81 (1978):

Where a party champions his own rights (as distinguished from those of a third party), and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.

Copper & Brass Fabricators Council, 679 F.2d at 955 (Ginsburg, J., concurring) (quoting *Duke Power*, 438 U.S. at 80-81).

256. *Cf. Data Processing*, 397 U.S. at 155 (noting that § 4 granted standing to a data processing company).

257. *Id.* at 156 (citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

258. *Id.* Congress may, however, affirmatively deny standing to a particular class. See *Block v. Community Nutrition Inst.*, 467 U.S. 340, 348 (1984) (holding that milk handlers, but not ultimate consumers, had standing to challenge the Secretary of Agriculture's decision that set the price of reconstituted milk on the ground that the statutory scheme evidenced congressional intent to deny consumers standing to challenge the Secretary's rulings).

259. See *Data Processing*, 397 U.S. at 153.

260. *Id.* (emphasis added). One commentator has noted that *Data Processing* had a two-fold purpose: "First, it sought to liberalize access to the federal courts. Second, the Court attempted to give content to the Administrative Procedure Act's grant of standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'" Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 74 (1984).

concluded that, though not intended beneficiaries, the data processors arguably were within the zone of interests established by section 4.²⁶¹

The Court reached a similar result in *Arnold Tours, Inc. v. Camp*,²⁶² permitting travel agents to sue the Comptroller for allowing banks, under their incidental powers granted by 12 U.S.C. § 24, to provide travel services to their customers: "The Court found it of no moment that Congress never specifically focused on the interests of travel agents in enacting § 4 of the Bank Service Corporation Act."²⁶³ In *Data Processing*, the Court was concerned that the data processors' association be "a reliable private attorney general to litigate the issues of the public interest in the present case."²⁶⁴ In another case, the Court wanted to preclude suits by those who would be "more likely to frustrate than to further statutory objectives."²⁶⁵

In 1987, the Supreme Court applied *Data Processing* to *Clarke v. Securities Industry Association*,²⁶⁶ in which a stockbrokers'

261. *Data Processing*, 397 U.S. at 155-57.

262. 400 U.S. 45 (1970).

263. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396 n.10 (1987) (citing *Arnold*, 400 U.S. at 46 n.3); see also *Investment Co. Inst. v. Camp*, 401 U.S. 617, 618-20 (1971) (relying upon *Data Processing* and reasoning that, when an association of investment companies sued the Comptroller of the Currency for violating the Glass-Steagall Banking Act of 1933 by authorizing banks to operate mutual investment funds, the competition that the Comptroller had authorized caused the plaintiffs an injury in fact and that Congress "had arguably legislated against the competition that the petitioners [the investment companies association] sought to challenge, and from which flowed their injury"). Justice Harlan dissented on the ground that, by enacting the banking legislation, Congress never intended to protect investment companies. *Id.* at 640 (Harlan, J., dissenting). He criticized the above quoted language, noting that neither the express wording of the Glass-Steagall Act nor its legislative history "evinced any congressional concern for the interests" of the investment companies. *Id.* (Harlan, J., dissenting). Justice Harlan noted that, if anything, the Act was adopted despite its anti-competitive effects. *Id.* (Harlan, J., dissenting). His dissent indicates that the Court squarely faced the question of intended versus direct beneficiary but rejected the intended beneficiary doctrine—the legally-protected-interest test—in favor of the zone-of-interest test implicitly granting standing to direct beneficiaries. See *id.* at 639-42 (Harlan, J., dissenting).

264. *Clarke*, 479 U.S. at 397 n.12 (quoting *Data Processing*, 397 U.S. at 154).

265. See *id.*

266. *Id.* at 394-403. At the same time the Court applied the zone-of-interest test to conclude that the direct but unintended beneficiary had standing, it suggested in dicta that the zone-of-interest test was "most usefully understood as a gloss" on § 702 of the APA, and "not a test of universal application." *Id.* at 400 n.16; WRIGHT, *supra* note

association sued the Comptroller of the Currency under the APA for allegedly permitting a bank to set up a discount brokerage "branch" out of state.²⁶⁷ The McFadden Act prohibits banks from having out-of-state branches.²⁶⁸ These banks may, however, establish out-of-state offices at which no "deposits are received, or checks paid, or money lent."²⁶⁹ In *Clarke*, there was little question that the plaintiff would suffer an injury in fact as a result of the agency's actions; presumably, at least some of the plaintiff's members would have to compete with the bank's out-of-state offices, which would sell stocks at a considerable discount.²⁷⁰ The Comptroller argued, however, that the stockbrokers association was not under the protection of the McFadden Act²⁷¹ because Congress passed the McFadden Act not to protect securities dealers "but to establish competitive equality between state and national banks."²⁷²

Rejecting the Comptroller's argument, the Court in *Clarke* stressed that the zone-of-interest test is "not meant to be especially demanding; in particular, there need be *no* indication of congressional purpose to *benefit* the would-be plaintiff."²⁷³ The Court's purpose in designing the zone-of-interest test was to allow parties to circumvent the requirement of showing that Congress

242, at 79 n.58. For the reasons stated above, however, the zone-of-interest test is appropriate for defensive invocation of treaties. In any event, regressing to the legally-protected-interest test has been criticized as contrary to Supreme Court precedent and unduly restrictive of plaintiffs' rights. See Doernberg, *supra* note 241, at 53 n.10.

267. *Clarke*, 479 U.S. at 392-93.

268. McFadden Act, ch. 191, §§ 7-8, 44 Stat. 1224, 1228-29 (codified as amended at 12 U.S.C. §§ 36, 81 (1994)).

269. 12 U.S.C. § 36(i) (1994).

270. See *Clarke*, 479 U.S. at 403.

271. *Id.* at 391-92.

272. *Id.* at 393.

273. *Id.* at 399-400 (citing *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971)) (emphasis added). But see *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 524-25 (1991) (removing the term "arguably" from the test and inquiring whether Congress "intended to protect jobs with the Postal Service" by enacting comprehensive legislation, including the postal monopoly); Marla E. Mansfield, *The "New" Old Law of Judicial Access: Toward a Mirror-Image Nondelegation Theory*, 45 ADMIN. L. REV. 65, 98-100 (1993) (discussing *Air Courier*). Interpreting the test restrictively defeats its purpose of expanding standing and would, if applied to a treaty case, unduly restrict a foreign litigant from invoking a treaty in our courts as envisioned by the Framers. See *supra* notes 20-74 and accompanying text.

intended to benefit the party asserting standing, a requirement that courts had applied in other contexts.²⁷⁴ At the same time, the Court did not wish to grant standing to every possible aggrieved party. In essence, the Court had adopted a direct beneficiary test that permitted the implementation of the Act's broad remedial purposes while simultaneously refusing to grant standing to all citizens²⁷⁵ solely by virtue of their citizenship.²⁷⁶

274. See *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 532-33 (1989); *California v. Sierra Club*, 451 U.S. 287, 294 (1981); *Cort v. Ash*, 422 U.S. 66, 78 (1975); *supra* note 230.

275. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 220 (1974); *United States v. Richardson*, 418 U.S. 166, 179 (1974). The generalized grievance cases, however, have been criticized for depriving every possible plaintiff of the right to litigate certain constitutional issues. See Doernberg, *supra* note 241, at 97-98.

276. The Court, however, has adopted a more restrictive test governing the defendants' standing to raise Fourth Amendment violations. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980) (holding that the defendant lacked standing to challenge the search of a companion's purse containing defendant's illicit drugs); *United States v. Payner*, 447 U.S. 727, 731-32 (1980) (concluding that defendant, a third party, lacked standing to invoke the exclusionary rule when an elaborate governmental scheme to burgle a banker's apartment and to take and photocopy documents from the banker's briefcase enabled government agents to obtain documents incriminating the defendant); *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). In *Rakas*, the Court denied car passengers standing to challenge a car search because they were neither the owners of the car nor the admitted owners of the seized shotgun and shells found in the car. *Id.* at 148. *Rakas* overruled the part of the test established in *Jones v. United States*, 362 U.S. 257, 267 (1960), that had recognized the standing of defendants who were "legitimately on [the] premises" at the time of the search, *Rakas*, 439 U.S. at 141-42.

The Court in *Rakas* asserted that it made no change in standing doctrine. *Id.* at 139-40 (citing, among other cases, *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-53 (1970)). Despite the Court's words, one commentator has noted that, at least in the Fourth Amendment standing cases, the Court has reverted sub silentio to the legally-protected-interest test repudiated by *Data Processing*. See Doernberg, *supra* note 241, at 88 n.226. Commentators have sharply criticized *Rakas* and its progeny for misusing standing rules to emasculate the Fourth Amendment. See, e.g., John M. Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979); Owen M. Fiss, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 177-78 (1979) (criticizing the Court for establishing a vague test and for "stretch[ing] too far" towards eliminating the *Jones* standard); Ira Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197, 224 (1980-1981) ("*Rakas* and *Rawlings* allow for the discretionary use of property law in any manner necessary to deny a motion to suppress."). But see Christopher Slobogin, *Capacity To Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387 (1981) (criticizing the vagueness

The “generous review provisions” of the APA, as interpreted by the Supreme Court, may be compared to the history and plain meaning of the Supremacy Clause, in which the Framers made treaties the “law of the land,” generally enforceable by individuals in state and federal courts.²⁷⁷ The Framers authorized foreigners to assert treaties in our courts to help the United States meet its treaty obligations and thus avoid conflict with other countries.²⁷⁸ Such a role is analogous to the “private attorney general” role that the Court envisioned under the APA for the direct beneficiaries of statutes. The plain meaning and drafting history of the Supremacy Clause likewise reveal the Framers’ desire that the Supremacy Clause should not be construed “grudgingly,” but broadly.²⁷⁹

Supreme Court precedent also suggests that a defendant who is “arguably within the zone of interests to be protected or regulated” by the treaty provision²⁸⁰ may invoke the treaty as a

of the *Rakas* test but noting that the Court still affords substantial Fourth Amendment protection).

In any event, *Rakas* should not apply to treaty violation cases. In *Rauscher*, *Ker*, and *Frisbie*, the Court distinguished government violations of domestic law from government violations of treaties, concluding that the latter required vindication of individual rights while the former did not. See *supra* notes 168-228 and accompanying text. The distinction probably rests, in part, on one of the purposes of the Supremacy Clause—that of avoiding conflict with other countries and the courts’ role in helping to avoid such conflict. Because treaty violation cases involve the potential for such international conflict, they warrant different treatment than do criminal cases in which the local constable has violated the rights of the accused.

277. See *supra* notes 20-74 and accompanying text.

278. See *supra* notes 59-74 and accompanying text.

279. See *supra* notes 20-74 and accompanying text.

280. See *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 396 (1986) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). Cases employing customary international law, as opposed to treaty law, to protect state sovereignty appear only to require that the party defending against the international-law violation show injury in fact. See, e.g., *The Appollon*, 22 U.S. (9 Wheat.) 362 (1824) (concluding that United States agents lacked authority to seize a French vessel in Spanish territory without Spain’s consent and, without inquiring whether the vessel owner was a direct beneficiary or an intended beneficiary of the custom, awarding the owner damages for the wrongful seizure). United States agents who trespass upon the territory of another country violate an established rule of customary international law: “It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter’s consent.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432 cmt. b (1987). Even those cases rejecting the applicability of customary international law appear to rest their holdings upon grounds other than the status of the defendant. See, e.g.,

defense to jurisdiction.²⁸¹ In *Rauscher* and *Ford*, for example, when our governmental agents allegedly acted unlawfully in seizing persons or property from abroad, the Court concentrated on the alleged illegality of the agents' conduct, not upon the status of the victim invoking international law to challenge the governmental proceeding.²⁸² One may infer from the facts of these cases, however, that, although they were not intended beneficiaries of the treaty provisions, the fugitive in *Rauscher* and the ship officers in *Ford* arguably were within the zone of interests protected or regulated by the extradition and anti-hovering treaties, respectively.²⁸³

B. Separation of Powers and Contractual Principles

Besides standing, the question of self-execution is complicated by the doctrine of separation of powers. If a treaty requires the United States to perform acts solely within Congress's enumerated powers, the treaty is non-self-executing.²⁸⁴ But no such separation-of-powers conflict arises when a defendant asserts the treaty

United States v. Alvarez-Machain, 971 F.2d 310, 311 (9th Cir. 1992) (holding essentially that customary international law is only an exception to the *Ker-Frisbie* doctrine when "the government's conduct [is] outrageous") (citing United States v. Reed, 639 F.2d 896, 901 (2d Cir. 1981); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974)). Some of these cases require a protest by the defendant's government in order for the defendant to have standing to invoke the international-law violation, see, e.g., United States v. Yunis, 681 F. Supp. 909 (D.D.C.), rev'd, 859 F.2d 953 (1988), but these cases generally do not otherwise suggest that more is required than showing that the defendant is the direct victim of the international-law violation, see *supra* note 10 (discussing customary international law). A full discussion of whether a government protest is required for standing is beyond the scope of this Article; however, the text and drafting history of the Supremacy Clause indicate that protest is not required. See United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) (implying that no foreign government protest is required); Vázquez, *supra* note 63, at 1160 (suggesting that no protest is required for standing under treaties). But see United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.) (requiring a protest in order to assert a treaty defensively), cert. denied, 421 U.S. 1001 (1975); Mitchell J. Matorin, Note, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 DUKE L.J. 907, 923-34 (1992) (asserting that standing under an extradition treaty rests on an "adequate" protest from the asylum state).

281. See *supra* notes 168-229 and accompanying text.

282. See *supra* notes 168-229 and accompanying text (discussing *Rauscher*, *Ford*, and other cases).

283. See *supra* notes 168-229 and accompanying text.

284. See *supra* note 92 and accompanying text.

as a defense to a federal prosecution.²⁸⁵ The executive has direct authority over United States prosecutors and law enforcement agencies.²⁸⁶ When a treaty imposes a negative obligation on the United States concerning the conduct of federal law enforcement agents, the executive does not need congressional action to carry out the treaty obligation.²⁸⁷ Such a treaty, therefore, should be considered *prima facie* self-executing.

In summary, a court should find a treaty provision self-executing except when the treaty provision violates separation-of-powers principles or expressly makes itself or other treaty terms inapplicable in domestic courts.²⁸⁸ Given the plain language of the Supremacy Clause and the Framers' intent,²⁸⁹ American courts should construe the doctrine of non-self-execution narrowly, adopting the theme that the doctrine is a limited exception to the general rule of self-executing treaties. The proposed test to determine whether a treaty term is self-executing and invocable as a defense rests on the Framers' presumption that treaties are self-executing. To rebut this presumption, the government would have to obtain an affirmative response to questions one or two below or a negative response to question three:

1. Would the court's enforcement of the treaty provision invade the power of another branch of government? For example: (a) Would enforcing the treaty trespass on one of the House's exclusive, enumerated powers?²⁹⁰ (b) Would enforcing the treaty pose a political question?²⁹¹ or (c) Is the treaty provision so vaguely worded that, by attempting to interpret it, a court risks severe encroachment upon the exclusive treaty-

285. See *supra* notes 212-17 and accompanying text.

286. By virtue of the Supremacy Clause, state courts are obligated to follow a legally ratified treaty even if state law or a prosecution under state law conflicts with the treaty. See *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that a valid treaty prevails over an inconsistent state statute); cf. *United States v. Rauscher*, 119 U.S. 407, 430-31 (1886) ("[I]f the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the Federal government, which has been fully recognized.").

287. See *supra* note 128 and accompanying text.

288. See *supra* note 133 (discussing Senate reservations).

289. See *supra* notes 20-74 and accompanying text.

290. See *supra* note 92.

291. In an enforcement proceeding, the government will rarely, if ever, be able to show how the treaty is nonjusticiable. See *supra* note 94.

making power of the President and the Senate?²⁹²

2. Does the treaty by its own terms prohibit it from operating in United States domestic courts? For example: (a) Did the parties include a broad, unqualified domestic implementation clause clearly indicating that the treaty as a whole or the treaty provision in question will not operate locally without domestic legislation?²⁹³ (b) Did the Senate attach a reservation to the treaty clearly making the treaty as a whole or the treaty provision in question non-self-executing?²⁹⁴ or (c) Does the treaty contain a *Cardenas*-type provision that expressly renders the treaty as a whole or the treaty term in question non-self-executing?²⁹⁵

3. Does the defendant have standing? Did the government's violation of the treaty cause the defendant to suffer an injury in fact, and is the defendant within the zone of interests arguably protected or regulated by the treaty?²⁹⁶

The U.N. Drug Trafficking Convention will be examined under the test set forth above.²⁹⁷ This Article will examine the treaty's text,

292. This prong incorporates the requirement of precise and mandatory language. See *supra* notes 95-129 and accompanying text.

293. See *supra* notes 134-42 and accompanying text.

294. See *supra* note 133 and accompanying text.

295. See *supra* notes 130-31 and accompanying text.

296. See *supra* notes 234-83 and accompanying text.

297. See *supra* note 6. Assuming that individuals may assert Articles 2 and 6 in United States courts as a bar to personal jurisdiction, a court would need to fashion an appropriate remedy. The usual remedy for want of personal jurisdiction is dismissal. See, e.g., *Johnson v. Browne*, 205 U.S. 309 (1907); *Cosgrove v. Winney*, 174 U.S. 64 (1899); *United States v. Rauscher*, 119 U.S. 407 (1886). When property or persons are wrongfully seized, the remedy is return. See *Cosgrove*, 174 U.S. at 68-69. Under the Supremacy Clause, not only are treaties the "supreme Law of the Land," but also the remedies fashioned as a matter of general and customary international law in construing treaties. See Vázquez, *supra* note 63, at 1161. Under international law, the typical remedy for wrongful seizure is to put the parties back to status quo ante. See *id.* at 1157. State practice in state-sponsored abduction cases reflects the remedy of dismissal and return to the asylum state. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432 (1987); see *In re Jolis*, 7 Ann. Dig. 191-92 (Tribunal Correctionnel d'Adresnes 1933) (Fr.) (ordering the return to Belgium of a Belgian national kidnapped by French police on Belgian soil after Belgium protested); Charles Rousseau, *Chronique des Faits Internationaux*, 69 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 761, 834 (1965), translated in JOSEPH M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM 48-49 (2d ed. 1981) (discussing an official apology given by Italian police to

purpose, and negotiating history to determine whether the above criteria are met. Lastly, this Article will examine manifest public policy considerations that may further support a court's ultimate determination of personal jurisdiction over defendants invoking the Convention.

IV APPLYING THE TEST TO THE U.N. DRUG TRAFFICKING CONVENTION

A. *Introduction to the Convention*

For many years, the United States chose to act either alone or bilaterally on the enforcement level in attempting to curb the import of drugs into the United States.²⁹⁸ Because the drug

the Swiss government for a kidnapping by an Italian police officer of an Italian national from Swiss territory). *But see* Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 749 (1992) (noting the argument that abduction may not violate international law when a state abducts an individual in anticipatory self-defense under Article 51 of the U.N. Charter but observing that no such grounds existed for Alvarez-Machain's kidnapping); Paust, *supra* note 237, at 567 (suggesting that return may not be necessary in extraordinary cases but noting that *Alvarez-Machain* did not fit in that category).

The United States has recognized the remedy of return. During the Vietnam War, for example, Ronald Anderson, an American citizen and conscientious objector, fled to Canada to escape the draft. Alerted that Anderson was going to come back, United States Customs agents were waiting for him as he was about to cross the border. The agents, however, were impatient and encroached approximately 50 yards into Canada and arrested Anderson while he was still on Canadian soil. After a Canadian protest, the United States returned Anderson to Canada. SWEENEY ET AL., *supra*, at 133 (citing 79 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 462 (1975)). The United States granted this remedy to one of its own nationals for a minimal intrusion into Canadian territory. United States courts should have no difficulty in granting a similar remedy to a foreign national in the case of a state-sponsored kidnapping within the heartland of the host state. *Cf. The Over The Top*, 5 F.2d 838 (D. Conn. 1925) (holding unlawful the seizure of a schooner carrying whiskey 19 miles off the United States coast, dismissing libels against the schooner and its cargo, and implicitly ordering vessel and cargo returned).

298. ALFRED W. MCCOY, *THE POLITICS OF HEROIN* 485-87 (1991). From the inception of international drug control, however, the United States has been involved in establishing regimes to stop the illicit drug trade. Starting with the International Opium Convention at The Hague of 1912, Convention Internationale de l'Opium [Convention for the Suppression of the Abuse of Opium and Other Drugs], Jan. 23, 1912, 38 Stat. 1912, 8 L.N.T.S. 187 [hereinafter International Opium Convention], and continuing through the rest of the century, the United States played a leading international role. *See* Protocol Amending the Single Convention on Narcotic Drugs, Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3; Convention on Psychotropic Substances,

trade, however, operates globally with drug cartels resembling multinational corporations, many governments, including the United States, now recognize that suppressing it requires multi-lateral cooperation. The U.N. Convention Against Illicit Drugs represents the most ambitious attempt to enlist the countries of the world in this effort. Adopted by consensus by 106 nations in December 1988,²⁹⁹ the Convention is one of the most comprehensive criminal-law treaties ever created. As a member of the United States delegation stated: "The Convention is one of the most detailed and far-reaching instruments ever adopted in the field of international criminal law,³⁰⁰ and if widely adopted and effectively implemented, will be a major force in harmonizing national laws and enforcement actions around the world."³⁰¹ The United States was one of the Convention's chief sponsors.³⁰²

Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175; Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204; Protocol Limiting and Regulating the Cultivation of the Poppy Plant, the Production of International and Wholesale Trade in and Use of Opium, June 23, 1953, T.I.A.S. No. 5273, 456 U.N.T.S. 3; Protocol Bringing Under International Control Drugs Outside the Scope of the Convention of July 13, 1931, Nov. 19, 1948, T.I.A.S. No. 1671, 44 U.N.T.S. 277; Proclamation by the President, Declaring the Entry into Force of Amendments Set Forth in the Annex to the Protocol of December 11, 1946, Respecting Narcotic Drugs, Mar. 30, 1948, 62 Stat. 1796, T.I.A.S. No. 1859; Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, Dec. 11, 1946, 61 Stat. 2230, 12 U.N.T.S. 179; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 48 Stat. 1545, 139 L.N.T.S. 301.

299. David P. Stewart, *Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DENV. J. INT'L L. & POL'Y 387, 387 (1990).

300. The Convention depends on the cooperation of individual states, not on the direct operation of an international regime. Professor Bassiouni has criticized the signatory states' reluctance to establish an international regime in which the laws would be established on the international level rather than under an agreement to enact laws on the nation-state level. *Hearings Before the Senate Foreign Relations Comm. on the Ratification of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 101st Cong., 1st Sess. 127 (1989) [hereinafter *Senate Ratification Hearings*] (statement of M. Cherif Bassiouni, Professor of Law); see M. Cherif Bassiouni, *Effective National and International Action Against Organized Crime and Terrorist Criminal Activities*, 4 EMORY INT'L L. REV. 9, 33-39 (1990).

301. Stewart, *supra* note 299, at 388; see D.W. Sproule & Paul St-Denis, *The UN Drug Trafficking Convention: An Ambitious Step*, CAN. Y.B. INT'L L. 263 (1989) (explaining provisions of the Convention and evaluating its effectiveness as a weapon against drug trafficking).

302. Stewart, *supra* note 299, at 388.

The Convention requires state parties to share information on drug offenders and cartels,³⁰³ to outlaw money laundering and a host of drug offenses,³⁰⁴ to regulate sale and distribution of precursor chemicals,³⁰⁵ to extradite certain individuals suspected of violating drug laws,³⁰⁶ to confiscate the assets of drug offenders,³⁰⁷ and to abolish bank secrecy for drug investigative purposes.³⁰⁸ In addition to requiring state parties to enact domestic antidrug legislation, the Convention contains a mutual legal assistance treaty³⁰⁹ (MLAT) and an extradition treaty.³¹⁰

The Convention also amends all existing extradition treaties³¹¹ that the parties have with each other.³¹² First, the Convention makes drug and money laundering offenses “extraditable offences” for purposes of any extradition treaties between any of the parties.³¹³ Second, the Convention declares that the drug offenses listed in Article 3 shall not be considered “fiscal offences” or “political offences” or “regarded as politically motivated.”³¹⁴ Drug offenses thus do not qualify for the generally recognized political

303. *Id.* at 391-94.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. U.N. Drug Trafficking Convention, *supra* note 6, art. 7. Article 7 of the Convention provides “the widest measure of mutual legal assistance” to other state parties in “investigations, prosecutions and judicial proceedings” concerning the enumerated drug offenses. *Id.* Mutual Legal Assistance Treaties (MLATs) are the tool whereby one state helps to provide another state with evidence of a crime that is admissible in the court of the requesting state. Article 7.2 of the MLAT within the Convention includes taking statements, serving process, executing searches and seizures, examining objects and sites, providing relevant documents, and identifying and tracing proceeds, property, and instrumentalities of crime. *Id.* art. 7.2.

310. *Id.* art. 6.

311. Although most of the bilateral extradition treaties entered into by the United States include drug crimes as extraditable offenses, few of our treaties make money laundering an extraditable offense. *Senate Ratification Hearings*, *supra* note 300, at 127 (statement of Richard L. Thornburgh, Attorney General of the United States). Consequently, the Convention, on this basis alone, will have a significant impact on extradition law.

312. Most extradition treaties are bilateral accords. Some regional and multilateral extradition treaties, however, are in force. See 1 BASSIOUNI, *supra* note 94, ch. I, § 4, at 25-30.

313. U.N. Drug Trafficking Convention, *supra* note 6, arts. 6.1-2.

314. *Id.* art. 3.10.

offense exception to extradition.³¹⁵ Third, the Convention requires that state parties either extradite individual suspects or try them domestically, assuming that the requested state has jurisdiction to do so.³¹⁶ Fourth, the Convention itself is intended to serve as an extradition treaty between any of the parties who do not have a bilateral treaty³¹⁷

315. *But see* Sproule & St-Denis, *supra* note 301, at 272-75 (noting that the exclusion of the political offense exception is essentially hortatory and does not apply to politically motivated requests). On the political offense exception generally, see Barbara A. Banoff & Christopher H. Pyle, "To Surrender Political Offenders": *The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169 (1984) (providing recommendations as to how the exception should be applied).

316. U.N. Drug Trafficking Convention, *supra* note 6, art. 6.9.

317. *Id.* art. 6.3; *see also id.* art. 6.4 (requiring the extradition of drug offenders by parties who do not demand extradition treaties in order to extradite a suspect).

By reservation, the United States does not recognize the Convention as authorizing the extradition of citizens to countries with whom we do not have an extradition treaty. Apparently, Senator Helms was concerned that the United States would be compelled to extradite individuals to certain outlaw states, which he claimed could compromise legitimate drug enforcement efforts. *See* EXEC. REP. NO. 15, 101st Cong., 1st Sess. 52, app. at 178 (1989) [hereinafter EXECUTIVE REPORT]. The reservation provides as follows:

Resolved (two-thirds of the Senators Present concurring therein), That the Senate advise and consent to the ratification of The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on December 20, 1988, subject to the following understandings:

(1) Nothing in this Treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States.

(2) The United States shall not consider this convention as the legal basis for extradition of citizens to any country with which the United States has no bilateral extradition treaty in force.

(3) Pursuant to the rights of the United States under Article 7 of this treaty to deny requests which prejudice its essential interests, the United States shall deny a request for assistance when the designated authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this treaty is engaged in or facilitates the production or distribution of illegal drugs.

135 CONG. REC. S16,616 (daily ed. Nov. 21, 1989).

B. The Drafting History of Articles 2 and 6 and the U.N. Drug Trafficking Convention

The history of the Convention's extradition provision (Article 6) is particularly revealing. Coupled with the antiforeign law enforcement provision (Article 2), the history indicates that the parties implicitly intended to bar state-sponsored kidnapping. The United States proposed a provision requiring each state to extradite its own nationals. The proposal was overwhelmingly rejected:

The United States had hoped to include a broad obligation to extradite one's own nationals in this article. Unfortunately there was overwhelming opposition from countries which, for either political or legal reasons, would not accept any provision on the extradition of their nationals, even a hortatory provision. Thus, [article 6] contains no provision on the extradition of nationals.³¹⁸

318. EXECUTIVE REPORT, *supra* note 317, at 50 (commenting on Article 6 of the Convention); *see also id.* app. at 132 (testimony of Richard L. Thornburgh, Attorney General of the United States). Paragraph 5 of the original draft of the extradition Article provided: "A request for extradition with respect to any of the offenses to which this article applies shall not be refused: (a) On the ground that the person sought is a *national* of the requested Party, *unless such refusal is required by the constitution of the requested Party.*" 1 *United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, at 5, art. 4, para. 5, U.N. Doc. E/CONF.82/16 (1994) [hereinafter 1 *Official Records*] (emphasis added). The United States proposed that the language following "unless" be deleted. *Working Document on the Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Division of Narcotic Drugs, at 55, para. 412, U.N. Doc. DND/DCIT/WP.1 (1987) [hereinafter *Working Document*]. The United States argued that "permit[ting] traffickers to avoid extradition on the basis of nationality, would undercut the spirit and the intent of the Convention." *Id.* Not only did the parties reject the United States' proposal, they also overwhelmingly rejected the original draft as overly broad. EXECUTIVE REPORT, *supra* note 317, at 50; *see also* Sproule & St-Denis, *supra* note 301, at 279-80 (discussing the limitations on extradition). Instead, the following paragraphs were adopted:

Paragraph 5. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, *including the grounds upon which the requested Party may refuse extradition.*

Paragraph 10. If extradition, sought for purposes of enforcing a sentence, is *refused* because the person sought is a *national* of the requested Party, the requested Party shall, if its law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence which has been imposed under the law of the requesting Party, or the remainder thereof.

The vast majority of the countries opposing such a requirement noted that their domestic law prohibits extradition of their nationals, indicating an intent to shield such nationals from extradition.³¹⁹ In the words of the Norwegian delegate speaking for the Scandinavian countries, "[b]elieving that *the protection of the rights of the person sought* was one of the most significant principles in international law, [the Scandinavian countries] considered that a State should never be obliged to extradite its nationals."³²⁰ Only a few states asserted state sovereignty as the basis for refusing to extradite their own nationals.³²¹ The over-

U.N. Drug Trafficking Convention, *supra* note 6, art. 6 (emphasis added); see also 2 *United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, at 107, paras. 26-30, U.N. Doc. E/CONF.82/16/Add.1 (1991) [hereinafter 2 *Official Records*] (relating the comments of the United States delegate, who believed that extradition is the most "effective and powerful" weapon against drug trafficking); *Working Document, supra*, at 55-56, paras. 404-11, 413-14 (1987) (suggesting that the parties involved—Saudi Arabia, Egypt, Denmark, Belgium, Hungary, Switzerland, Romania, Greece, Czechoslovakia, Spain, Poland, Portugal, and Japan—sought either to weaken the effect of the original draft or to delete it outright). The drafting history suggests that the United States' proposal to strengthen the original draft was not seriously considered. The United States' position, however, is understandable because states that refuse to extradite their nationals often do not prosecute them for the crime(s) in question. See Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 815 (1993). State-sponsored kidnapping is, however, not the solution. We and other members of the international community must persuade these countries to prosecute the criminals and must provide mutual legal assistance to facilitate the prosecutions. Accordingly, the Convention generally requires requested states to prosecute the offender, including a national, found in their jurisdiction if they do not surrender her. See U.N. Drug Trafficking Convention, *supra* note 6, art. 6.9.

319. See 2 *Official Records, supra* note 318, at 105-10, paras. 7-87; see also *id.* at 117, para. 22 (noting that "the majority of States could not extradite their own nationals"); 1 *id.* at 36, para. 64.

320. 2 *id.* at 105, para. 7 (emphasis added). The Norwegian delegate stressed, however, that the Nordic countries did punish their own nationals for offenses committed abroad and were prepared to continue to do so. *Id.* at 105 para. 9. Other countries expressly indicating that extraditing nationals would violate their constitutions or domestic law included Afghanistan, Brazil, Cameroon, Czechoslovakia, Egypt, the Federal Republic of Germany, France, Greece, Indonesia, Iran, Jordan, Kuwait, Libya, Mexico, Morocco, Senegal, Thailand, Turkey, and Yemen. *Id.* at 105-11, paras. 7-102. Other countries expressing their opposition in the debates include Algeria, Austria, China, Jamaica, Japan, and Israel. *Id.* The United States expressly supported the proposal to extradite nationals. *Id.* at 107, paras. 26-30. Argentina and Mauritius appeared to stake out a compromise position. *Id.* at 109, paras. 67, 69.

321. See 1 *id.* at 36, para. 63 (stating that some states felt that "the discretion of

whelming opposition to a weaker mandatory extradition requirement than that which the United States had proposed suggests that the parties to the Convention intended to safeguard the rights of their nationals from the law enforcement agencies of other countries.

Later in the negotiations of the treaty, Mexico, which had been a minor player, demanded that an article be added to the Convention that would effectively prohibit foreign law enforcement agents from operating on another country's territory without that country's consent.³²² In the words of one delegate, Mexico's proposal came as a "bombshell."³²³ The United States strongly opposed the addition, apparently believing that the proposal would sabotage the entire convention by permitting the parties to escape their obligations under the treaty.³²⁴ The Report of the Senate Foreign Relations Committee noted that the negotiating history of this controversial article "differ[ed] significantly from that of all others in the Convention."³²⁵ Mexico's limitation read:

Nothing in this Convention empowers, in any way whatsoever, the authorities of one of the States Parties to undertake, to attempt to undertake or to exercise pressure in order to be allowed, in the territorial jurisdiction of any of the other States Parties, the exercise and performance of functions whose jurisdiction or competence are exclusively reserved to the authorities of each of those other States Parties by their respective national laws and regulations.³²⁶

sovereign States to refuse extradition should not be restricted").

322. See EXECUTIVE REPORT, *supra* note 317, at 22-24. The general outline of every other article of the Convention was known and essentially accepted early in the negotiations. *Id.* at 22. Article 2, however, was not proposed until July 1988, *id.*, only six months before the Convention's conclusion, after four years of preparation, including two years in negotiation, *id.* at 2.

323. Telephone Interview with a Delegate to the Convention Who Requested Anonymity (July 22, 1994).

324. The United States "strongly opposed" Mexico's proposal, EXECUTIVE REPORT, *supra* note 317, at 22, which "[i]n broad outline would have characterized the Convention very narrowly as an 'instrument of international cooperation', the implementation of which would be limited by 'the most strict respect for' the internal legal system of each Party," *id.*, see *infra* note 483 and accompanying text (reproducing paragraphs 1 through 4 of Mexico's proposed article).

325. EXECUTIVE REPORT, *supra* note 317, at 22.

326. 1 *Official Records*, *supra* note 318, at 76. This is paragraph 2 of the original

Mexico apparently proposed the article after a spate of American Drug Enforcement Administration (DEA) operations on Mexican soil, including the kidnapping of Mexicans by United States agents.³²⁷

Although the United States strongly opposed Mexico's proposal, forty-two countries quickly supported a slightly modified version.³²⁸ Canada and Mexico co-sponsored this modification.³²⁹

Mexican proposal. See *infra* note 483 and accompanying text (containing the full text of the proposal).

327. The proposal was made after the Camarena and Urquidez cases, both of which caused concern in Mexico about the role of United States DEA agents in that country. Telephone Interview with Miguel Ruiz Cabañas, Minister of Border Affairs of the Mexican Embassy (July 21, 1994) [hereinafter Cabañas Interview]. Mr. Cabañas was attached to the Mexican delegation during the negotiations on the Convention Against Illicit Drugs. *Id.* In 1985, Enrique Camarena, an undercover DEA agent, was tortured and killed by suspected drug dealers in Guadalajara, Mexico. See Jay Matthews, *U.S. Obtains Recording of Drug Agent's Torture*, WASH. POST, Feb. 15, 1986, at A3. In 1986, Rene Martin Verdugo-Urquidez was apprehended in Mexico by Mexican police officers, turned over to the DEA, and taken to the United States for trial. *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1343 (9th Cir. 1991), *vacated and remanded*, 505 U.S. 1201 (1992). He was never formally extradited. See *id.* A federal grand jury indicted him on charges relating to the death of Camarena. *Id.* Subsequently, Mexico lodged "a formal complaint regarding the kidnapping of Verdugo," alleging that the police officers were "surreptitiously hired by the DEA" to abduct him. *Id.* (quoting letters from the Mexican Embassy to the U.S. Department of State). These two cases caused a heated debate in Mexico. Many Mexicans were surprised to learn that DEA agents were operating in their country. Cabañas Interview, *supra*.

328. See *Amendment Submitted by Afghanistan et al.*, United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/C.1/L.1/Rev.2/Add.1 (1988) [hereinafter *Sponsors*]. The Canadian-Mexican proposed article simplified the language of the original Mexican proposal while continuing the theme that each party's sovereignty and territory should be respected. The Canadian-Mexican proposal provided as follows:

SCOPE OF THE CONVENTION

1. This Convention constitutes an instrument of inter-national co-operation, aimed at ensuring maximum effectiveness in the struggle of the States Parties against the illicit traffic in narcotic drugs and psychotropic substances. Its provisions are directed at all aspects of the problem with strict respect for the provisions of the internal system of each State Party.
2. Nothing in this Convention derogates from the principles of the sovereign equality and territorial integrity of States or that of non-intervention in the domestic affairs of States.

The Canadian representative emphasized that the magnitude of this criminal-law treaty required assurances that every state would respect the territory of every other state: "Not surprisingly, when States were asked to assume obligations in new fields they were, and legitimately so, concerned that those did not infringe on universally recognized legal principles such as the sovereign equality and territorial integrity of States."³³⁰

3. Nothing in this Convention empowers the authorities of one of the States Parties to undertake, in the territorial jurisdiction of any of the other States Parties, the exercise and performance of functions whose jurisdiction or competence are exclusively reserved for the authorities of those other States Parties by their national laws and regulations.

Amendment Submitted by Canada and Mexico, United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/C.1/L.1 (1988) [hereinafter *Canadian & Mexican Amendment*].

329. See *Canadian & Mexican Amendment*, *supra* note 328. Aside from Canada and Mexico, there were a considerable number of countries from the Western hemisphere among the 42 states that co-sponsored the article: Argentina, Bahamas, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Jamaica, Panama, Paraguay, Peru, Uruguay, and Venezuela. *Sponsors*, *supra* note 328.

The Canadian-Mexican proposal did weaken the original Mexican proposal to some extent; the original proposal prohibited one state from "*exercis[ing] pressure in order to be allowed*" to operate in the territory of the weaker state. See *infra* note 483 and accompanying text (emphasis added). The Canadian-Mexican proposal deleted the emphasized phrase from Mexico's original. See *supra* note 328. Presumably, the Convention permits the exercise of such pressure to induce cooperation but does require cooperation by the requested state in the form of affirmative permission to conduct any type of police operation on its soil or within its waters. For example, the DEA operation conducted to kidnap Alvarez-Machain was carried out without official cooperation from Mexico. See *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992). Consequently, the kidnapping would have violated Article 2 had the Convention been in effect at the time. If, however, the United States had pressured Mexico into giving up Alvarez-Machain or in permitting U.S. agents to apprehend him, then the United States would not have violated the Article.

330. 2 *Official Records*, *supra* note 318, at 155, para. 87. The proposal, however, did not allow the parties to use their domestic law to avoid their obligations under the treaty and added that the "provision merely reiterated accepted and well-recognized international law concerning the territorial integrity of States, nothing more." *Id.* at 155, paras. 88-89 (relating the comments of the Canadian delegate). Despite the delegate's disclaimer, "merely reiterating" such recognized international law would have been unnecessary and superfluous because of its generally accepted character. By insisting, over considerable opposition, that the language appear as an article, as opposed to a preamble as the United States wished, and that it contain far more specificity than Article 2(4) of the U.N. Charter, the controversial Article 2 of the Drug Trafficking Convention assumes greater dimension.

Given its breadth, the Convention needed an antforeign law enforcement article to make clear, at the outset, the absolute respect for each country's territory.³³¹ Because this Convention was "significantly broader in scope particularly with regard to its criminal law provisions"³³² than the 1961 Single Convention,³³³ the 1971 Convention on Psychotropic Substances,³³⁴ and the 1972 Protocol,³³⁵ such an article was required.³³⁶

The Canadian representative explained that the ban on law enforcement from trespassing upon another state's territory did not prevent one country from permitting another to operate in such a manner.³³⁷ The purpose of the article was, instead, to prevent parties from "unilaterally extend[ing their] jurisdiction beyond their borders."³³⁸ Over the strong objections of the United States, the proposed article and its subsequent drafts garnered wide support from other countries.³³⁹ As it became obvious that the United States' objections would fail,³⁴⁰ the United States

331. *See id.* at 155, paras. 90-92.

332. *Id.* at 155 para. 91.

333. Single Convention on Narcotic Drugs, *supra* note 298.

334. Convention on Psychotropic Substances, *supra* note 298.

335. Protocol Amending the Single Convention on Narcotic Drugs, *supra* note 298.

336. *See 2 Official Records, supra* note 318, at 155, paras. 87-92. The Canadian representative recognized that the proposed Convention contained other safeguards. *Id.* Nonetheless, he emphasized that stating general principles at the beginning of the Convention avoided misunderstandings and helped to reassure the state parties about assuming their other obligations under the Convention. *Id.* at 155, para. 92. The Canadian representative stated:

In response the sponsors would emphasize that none of the principles contained in article 1 *bis* [the Canadian and Mexican proposal] went beyond those contained in the other articles of the draft convention. It was useful, however, to emphasize such general principles [prohibiting one state from exercising law enforcement functions in another state], at the beginning of the convention so that there could be no misunderstanding. Moreover, the sponsors were confident that with the clarification provided by article 1 *bis* [the proposed article], delegations and Governments would feel reassured and less hesitant to assume the obligations contained in the other articles of the convention.

Id.

337. *See id.* at 155, para. 90. "[The proposed article] was not intended to prevent joint co-operation in areas normally reserved for the exclusive jurisdiction of one Party." *Id.*

338. *Id.*

339. EXECUTIVE REPORT, *supra* note 317, at 23.

340. *Id.* Despite United States opposition, the Review Group sent the proposal on

made its own proposal, which changed some language but left Mexico's paragraph 2 (now Article 2.3) virtually intact:³⁴¹

3. Nothing in this Convention empowers the authorities of one of the States Parties to undertake, in the territorial jurisdiction of any of the other States Parties, the exercise and performance of functions whose jurisdiction or competence are exclusively reserved for the authorities of those other States Parties by their national laws and regulations.³⁴² A State Party to the present Convention shall not undertake in the territory of another State Party the independent exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its national law and regulations.³⁴³

The amended third paragraph uses mandatory language—"[a] State Party shall not undertake"³⁴⁴—that denotes and connotes legal obligation.³⁴⁵ The earlier version used the absolute negative—"nothing in this Convention empowers"³⁴⁶—but the deletion of that prefatory phrase and the use of the phrase "shall not undertake" alone appeared to make the obligation equally strong.³⁴⁷ The Mexican and Canadian representatives

to the Plenipotentiary conference. At that conference, a Canadian-Mexican proposal was substituted for Mexico's original. *Id.* Although finding the substitute proposal "less objectionable," the United States delegation still opposed it, characterizing the joint Canadian-Mexican proposal as "superfluous, premature and inappropriate." *Id.* Debate in the conference revealed that a number of Western countries supported the proposal or some other form of scope article. This debate convinced the United States delegation that the Convention would "for political reasons" need to contain a scope article. *Id.* The United States also had argued that part of the proposal should be in the preamble, as being part of the background and general principles behind the treaty, but gave up on this point. *Id.*

341. *Id.* After informal consultation with other delegations, including Mexico, the United States proposed a scope article. *Id.*

342. *Canadian & Mexican Amendment*, *supra* note 328.

343. 2 *Official Records*, *supra* note 318, at 171, para. 8 (the United States' proposal is shaded; the Canadian-Mexican portion of the proposal is not). The United States' proposed second paragraph phrased the parties' obligations affirmatively rather than negatively: "States Parties shall carry out their obligations under the present Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States." *Id.*

344. *Id.*

345. The phrase "shall not" creates a negative obligation: "To create a duty not to act (i.e., a prohibition), say 'shall not.'" DICKERSON, *supra* note 84, at 214.

346. *Canadian & Mexican Amendment*, *supra* note 328, at para. 3 (emphasis added).

347. Webster's defines "undertake" as, among other things, "to engage in," WEBSTER'S

discerned no substantive difference between their joint proposal and the language proposed by the United States.³⁴⁸ The amended United States proposal was slightly modified and subsequently became Article 2 of the Convention.³⁴⁹

The United States Senate Report confirms the parties' intent in crafting Article 2, paragraph 3:

The third paragraph restates the corresponding provision of the original Mexican proposal, which reflected concern *that the Convention not be interpreted to allow law enforcement officials of one Party to operate on the territory of another Party in drug cases absent agreement between the two Parties concerned*. Paragraph 3 does no more than state in more specific terms one aspect of the duty to respect territorial integrity and not to intervene in domestic affairs contained in paragraph 2.³⁵⁰

The negotiation history as a whole thus indicates that the parties to the Convention sought to prevent foreign law enforcement from encroaching upon their soil and waters to interdict the illicit drug trade. Coupling Article 2's history with that of Article 6 indicates, at a minimum, that the parties intended to prohibit one state's law enforcement agents from trespassing upon another state and kidnapping that state's nationals.

C. Applying the Proposed Test to Articles 2 and 6

Under the proposed test, defendants may invoke Articles 2 and 6 of the Convention to challenge a trial court's jurisdiction when government agents have brought the defendants before the court by kidnapping them abroad.³⁵¹ Each prong of the test will be applied in turn. Although the test must necessarily focus on the basis for rebutting the presumption of self-executing treaties, that

THIRD NEW INTERNATIONAL DICTIONARY 2491 (1986), and "empower" as "to give authority to," *id.* at 744.

348. See 2 *Official Records*, *supra* note 318, at 176, paras. 2-6.

349. For the final version, reflecting slight changes in the U.S. proposal, see EXECUTIVE REPORT, *supra* note 317, at 22.

350. *Id.* at 24 (emphasis added). The Report to the Senate noted that the preceding paragraph (Article 2.2) restated "the concepts of sovereign equality, territorial integrity and non-intervention in domestic affairs, as they are enshrined in Article 2 of the UN Charter." *Id.*

351. See *supra* part III (discussing the proposed test).

presumption is the starting point of the analysis.

1. Separation of Powers: Would the Courts' Enforcement of the Treaty Provision Invade the Power of Another Branch of Government?

This prong involves three principal kinds of separation-of-powers concerns: (1) whether the treaty language at issue is sufficiently mandatory and precise, (2) whether enforcing the treaty provision in question would trespass upon one of Congress's exclusive, enumerated powers, and (3) whether enforcing the treaty would pose a political question.

First, Articles 2 and 6.5 appear to pass the mandatory and precise test.³⁵² Both Articles are cast in mandatory terms. Article 2.3 directs that the parties "*shall not* undertake [law enforcement functions] in the territory of another Party"³⁵³ Article 6.5 states that extradition "*shall* be subject to" the laws and treaties of the state prohibiting extradition of its nationals.³⁵⁴ The emphasized language closely resembles the language that the Supreme Court indicated was mandatory and presumably self-executing in *INS v. Cardoza-Fonseca*,³⁵⁵ discussed earlier.³⁵⁶

Articles 2 and 6.5 likewise are sufficiently precise. Article 2.3 compels the state parties not to "undertake in the territory of another Party" any law enforcement actions.³⁵⁷ The word "under-

352. Extradition treaties generally are considered self-executing and usually do not pose separation-of-powers issues. See 1 BASSIOUNI, *supra* note 94, at 39-40. Some of the subparagraphs of Article 6, however, do contain hortatory language and thus are not self-executing. See, e.g., U.N. Drug Trafficking Convention, *supra* note 6, art. 6.7 ("[t]he Parties shall *endeavor* to expedite extradition procedures") (emphasis added). Article 6.5, however, uses mandatory language and does not contemplate the enactment of implementing legislation: "Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition." *Id.* art. 6.5. It is, therefore, self-executing.

353. U.N. Drug Trafficking Convention, *supra* note 6, art. 2.3 (emphasis added).

354. *Id.* art. 6.5 (emphasis added).

355. 480 U.S. 421 (1987).

356. See *supra* notes 97-101 and accompanying text (suggesting that Article 33 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176, was mandatory: "No Contracting State shall *expel or return* (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened." (emphasis added)).

357. U.N. Drug Trafficking Convention, *supra* note 6, art. 2.3. That Article 2 is

take" is synonymous with "engage" and conveys the definite idea that certain conduct is prohibited on another country's soil.³⁵⁸ The next two phrases in the Article appear to be terms of art that, when combined, mean the performance of law enforcement functions.³⁵⁹ "[T]he exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law"³⁶⁰ Supreme Court precedent and United States practice support the special meaning given to these phrases.³⁶¹ Article 6.5 conditions extradition on the laws and treaties of the requested state and expressly permits every party to deny extradition on the grounds provided in their laws or treaties.³⁶² If any doubt about the meaning of either article remains, resort may be made to the drafting history, which indicates that Article 2.3 bars foreign law enforcement agents from acting within a country without its consent and that the parties amended Article 6.5 to protect nationals from extradition.³⁶³

Enforcing Articles 2.3 and 6.5 would not encroach upon Congress's exclusive enumerated powers. Article 2.3 is phrased negatively, telling the executive and its law enforcement agents what they may not do,³⁶⁴ and Article 6.5 deals solely with extradition.³⁶⁵ Neither article requires any allocation of funds, calls for a declaration of war, nor involves any of Congress's other enumerated powers. Consequently, the government would be unable to show a separation-of-powers conflict regarding this part of the prong.

The last part of this prong involves political questions: would enforcing the Convention and ousting the trial court of personal jurisdiction over a defendant kidnapped in violation of the Convention pose a political question?³⁶⁶ Since Article III and the

phrased negatively also supports a finding that it is sufficiently precise. *See supra* notes 126-29 and accompanying text.

358. *See supra* note 347.

359. *See infra* notes 396-420 and accompanying text.

360. U.N. Drug Trafficking Convention, *supra* note 6, art. 2.3.

361. *See infra* notes 416-20 and accompanying text.

362. U.N. Drug Trafficking Convention, *supra* note 6, art. 6.5.

363. *See supra* part IV.B.

364. U.N. Drug Trafficking Convention, *supra* note 6, art. 2.3.

365. *Id.* art. 6.5.

366. *See supra* note 94 (discussing political questions in this context).

Supremacy Clause empower the judiciary to interpret treaties, a court's interpreting the Convention does not usurp a power constitutionally committed to another branch and thus does not meet the first criterion for invoking the political question doctrine.³⁶⁷ Given the judiciary's experience in adjudicating the rights of criminal defendants,³⁶⁸ in determining the existence of personal jurisdiction, and in construing extradition treaties,³⁶⁹ ruling on abducted defendants' treaty rights is well within the judiciary's competence and thus does not meet the second criterion for invoking the political question doctrine.³⁷⁰ Although a court's decision regarding whether it has personal jurisdiction over an extradited fugitive may have policy undertones—particularly if the fugitive is extradited as part of the so-called drug war—reviewing this type of question is a core function of the judiciary.³⁷¹ Consequently, courts have not held such decisions to be political questions.³⁷² Because a state-sponsored kidnapping closely resembles a specialty rule violation, the same reasoning applies to adjudicating the personal jurisdiction of an abducted defendant. A defendant invoking the Drug Trafficking Convention would be asking a court to interpret the Convention's extradition article together with the antforeign law enforcement article, an analytical process similar to a routine interpretation of an extradition treaty.

The last criterion of the political question doctrine, the so-called "prudential" criterion, primarily addresses whether there is "an unusual need for unquestioning adherence to a political decision already made."³⁷³ In the context of exercising personal jurisdiction in contravention of the Convention, that issue is whether the

367. See *supra* note 94.

368. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 187 (1962) (arguing for a fairly broad political question doctrine but noting that administration of the criminal law is "well within [the Court's] experience").

369. Federal courts have interpreted extradition treaties since 1799. *United States v. Robbins*, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175). Since at least 1886, federal courts have determined whether they have personal jurisdiction over extradited fugitives. See, e.g., *United States v. Rauscher*, 119 U.S. 407 (1886).

370. See *supra* note 94.

371. See BICKEL *supra* note 368, at 187; Gouin, *supra* note 94, at 781.

372. See BICKEL, *supra* note 368, at 187; Gouin, *supra* note 94, at 781.

373. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

need to speak with one voice in foreign affairs makes this question nonjusticiable.³⁷⁴ Although such a concern might apply when the president and his senior advisors make a foreign policy initiative, it does not exist when lower federal officials engage in autonomous foreign adventuring.³⁷⁵ Whether these prudential concerns may be applied to foreclose a defense in a criminal case is doubtful.³⁷⁶ One might reasonably argue that, when the President personally orders the capture of a head of state abroad, as in the General Noriega case, prudential concerns might preclude the court's review of the issue. Even such an unusual case³⁷⁷ deals with the core function of the judiciary: "A court cannot deprive one of his liberty without ensuring an opportunity to have his constitutional claim determined."³⁷⁸ Because the Supremacy Clause elevates treaties to the same status as federal statutes and the

374. See BATOR ET AL., *supra* note 243, at 233; *supra* note 94.

375. See Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 946 (1993); Vázquez, *supra* note 63, at 113. *Contra* Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980) (granting habeas corpus to a Mariel-Cuban refugee on grounds that his indefinite detention violated customary international law), *aff'd on other grounds sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones prolonged arbitrary detention. "); *but see* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.) (holding that a Mariel-Cuban refugee's challenge that his indefinite detention by order of the Attorney General violated customary international law posed a political question), *cert. denied*, 479 U.S. 889 (1986).

376. BATOR ET AL., *supra* note 243, at 241; see Goun, *supra* note 94, at 781.

377. Never before had the United States forcibly brought a foreign head of state to this country to face criminal charges. *United States v. Noriega*, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990).

378. Goun, *supra* note 94, at 811 n.353 (quoting Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 235 (1985) (citing *Yakus v. United States*, 321 U.S. 414 (1944)); see Champlin & Schwarz, *supra*, at 234 n.81 (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) (5-4 decision)). Justice Jackson stated:

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program [to detain, among others, American citizens of Japanese ancestry] was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think [the courts] may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

Korematsu v. United States, 323 U.S. 214 (1944) (Jackson, J., dissenting).

Constitution,³⁷⁹ a court likewise should not deprive a defendant of her liberty without ensuring an opportunity to have her *treaty* claim determined.³⁸⁰

Because the Constitution expressly authorizes the judiciary to interpret treaties, because the courts have considerable experience in interpreting extradition treaties similar to the Convention provisions, and because an abducted defendant would invoke the treaty only as a defense to a criminal prosecution, the political question doctrine would not apply. Justice Powell noted that only an abject usurpation of executive power renders a treaty question nonjusticiable: "Such a case would arise if we were asked to decide, for example, whether a treaty required the president to order troops into a foreign country."³⁸¹ A court's examination of whether United States agents have kidnapped a single person in violation of a treaty is a far cry from determining whether a President must order troops into a foreign country.³⁸² Consequently, the political question doctrine has little applicability to an abduction case under the Convention.³⁸³

379. Vázquez, *supra* note 63, at 1134; *see also supra* part II.A.2.a (discussing the Framers' intent regarding the supremacy of treaties).

380. In *Noriega*, the district court determined that the defendant lacked standing to invoke alleged treaty violations because Panama did not protest his capture and arrest. *Noriega*, 746 F. Supp. at 1533. Whether the state of the abducted national must protest for the national to have standing to invoke the Convention against illicit drugs is beyond the scope of this Article. The evidence of the Framers' intent indicates that such a protest is unnecessary. *See supra* note 280.

381. *Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (Powell, J., concurring).

382. *Cf. Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (dismissing, on political question grounds, a suit by 110 members of Congress that challenged President Reagan's alleged violation of the War Powers Resolution in carrying out military action in the Persian Gulf). *But see* Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 107, 112-13 (Louis Henkin et al. eds., 1990) (criticizing *Lowry* as an abdication of judicial review).

383. *Contra Halberstam, supra* note 94, at 736. In *Sale v. Haitian Centers Council*, 113 S. Ct. 2549, 2567 (1993), the Court suggested, in a two-paragraph alternative holding, that it was a political question to enforce the Protocol on Refugees in order to stop the President's program of interdicting Haitians on the high seas and forcibly repatriating them without affording them an opportunity to petition for political asylum.

2. *Principles of Contract: Does the Treaty by Its Own Terms Prohibit It From Operating in United States Domestic Courts?*

This prong involves contract principles that deal mainly but not exclusively with domestic implementation clauses, Senate reservations, and *Cardenas*-type provisions that expressly render a treaty in whole or in part non-self-executing.³⁸⁴ Because the Senate did not attach a reservation to the Convention that made any of its provisions non-self-executing and because the Convention contains no *Cardenas*-type provisions, these exceptions to self-execution do not apply. The remaining question is whether the Convention contains a broad, unqualified domestic implementation clause making Articles 2 and 6, or the Convention as a whole, non-self-executing without a congressional enactment.

A treaty may have some provisions that are non-self-executing and others that are self-executing.³⁸⁵ Similarly, a treaty may have domestic implementation clauses that require domestic legislation to carry out some treaty provisions, but not others.³⁸⁶ Some terms of the Drug Trafficking Convention are expressly non-self-executing; they call upon each state party to enact certain laws outlawing use and sale of illicit drugs.³⁸⁷ Other terms are self-executing. The parties intended those to have immediate effect.³⁸⁸ The relevant provisions of the extradition article³⁸⁹ and some within the Mutual Legal Assistance article,³⁹⁰ for example,

384. For a fuller exposition of these issues, see *supra* notes 130-42 and accompanying text.

385. See *supra* note 142.

386. See Iwasawa, *supra* note 14, at 658-60.

387. See U.N. Drug Trafficking Convention, *supra* note 6, art. 3. Article 3 of the Convention requires that each party adopt laws criminalizing the production, cultivation, sale, purchase, and possession of narcotic drugs and psychotropic substances. *Id.*

388. See *id.* arts. 2.3, 6.2, 7; see also *infra* notes 392-95 and accompanying text (discussing the effect of self-executing terms).

389. Article 6.2 amends every extradition treaty between any of the parties to add, if not already listed, the drug offenses described in Article 3: "Each of the offenses to which this article applies *shall be deemed to be included* as an extraditable offence in any extradition treaty existing between Parties." U.N. Drug Trafficking Convention, *supra* note 6, art. 6 (emphasis added). Furthermore, Article 6.3 permits the Convention to serve as an extradition treaty between any parties that have not concluded an extradition treaty. *Id.* art. 6.3; see *supra* note 259 (quoting Article 6.5 in full); see also *supra* note 317 (discussing the Senate reservation concerning the extradition treaty).

390. For example, Article 7, paragraph 18, provides specific procedures for obtaining

fall into this category of self-executing terms, as does Article 2.3.³⁹¹ Nothing in its language or history suggests an intent to

the testimony of witnesses:

A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting Party, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or for any period agreed upon by the Parties, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.

U.N. Drug Trafficking Convention, *supra* note 6, art. 4.

391. The government could argue that, had the parties intended to give individuals rights under Article 2, the parties could have easily done so expressly. Article 18 demonstrates that, when the parties wished to provide individual rights, they knew how to do so. *See id.* art. 18. The parties easily could have added an additional paragraph to Article 2 stating: "No state party shall interrogate, detain, apprehend, punish or prosecute any individual in violation of this Article." Such an argument, however, misperceives the nature of treaties in American law. Possessing an express cause of action within the treaty is not a condition precedent for invoking a treaty in court and is not the way treaties are written. *See supra* parts II.A.2.a-B.2. Furthermore, Article 18 is a standard clause in a MLAT treaty. Article 2 is a foundational article, added late in the negotiating process to ensure that states do not trespass on the soil of other states. The importance of the Article is underscored by the controversy it engendered but also by the significant support it quickly garnered. *See supra* part IV.B.

Mexico, the original sponsor of Article 2, was particularly concerned about United States Drug Enforcement Agents violating their territory and abusing the authority granted to them. *See supra* notes 322-50 and accompanying text. Such abuses fall directly on Mexican nationals and others under Mexico's protection whom the DEA suspects of being in some way involved in illicit drug trafficking or possession. *See supra* note 350 and accompanying text. One state's surreptitious entry into another state to kidnap a national from that state not only affronts the dignity of that state but also grievously injures that state's kidnapped national. In fact, the drafting history and text of Article 6.5 indicate that the parties intended to protect the requested states' nationals. *See supra* notes 318-21 and accompanying text. The problem of having the DEA act outside its authority and exercise law enforcement functions on Mexican soil prompted Mexico to offer the article. *See supra* note 350 and accompanying text. The *Camarena* case and the alleged kidnapping of Verdugo-Urquidez occurred before Mexico proposed the article. *See supra* note 350. Reading Article 2 and Article 6 together suggests that the parties implicitly intended to protect their nationals from state-sponsored kidnapping. *See supra* notes 322-50. Consequently, just like the defendants in the extradition specialty cases and the ship master and the defendants in the Liquor Treaty cases, kidnap victims should be entitled to assert the treaty as

require each state to enact enabling legislation to make Article 2.3 effective. On the contrary, Article 2.3 was intended to be a condition precedent to having the parties carry out their other obligations under the treaty.³⁹² Severing the self-executing articles from the non-self-executing articles of the Convention is relatively easy because the non-self-executing articles have their own domestic implementation clauses.³⁹³ Other articles have no such clauses.³⁹⁴ Notably, neither Article 2 nor Article 6 has such an implementation clause, nor does any such clause in the treaty expressly or implicitly cover these articles.³⁹⁵

3. Standing: Do United States Agents Violate the U.N. Drug Trafficking Convention and Cause a Foreign National Injury in Fact When They Abduct a Foreign National from Her Country? Is Such a Foreign National Arguably Within the Zone of Interests Protected or Regulated by the Treaty?

Abducting a foreign national in violation of the Convention easily satisfies the injury-in-fact requirement.³⁹⁶ To determine whether such an individual is arguably within the zone of interests protected or regulated by the Convention requires

a defense. See *supra* notes 168-228 and accompanying text.

392. See *supra* notes 322-38.

393. For example, Article 3 begins as follows: "Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally: . . . " U.N. Drug Trafficking Convention, *supra* note 6, art. 3. Article 4, dealing with jurisdiction, and Article 5, dealing with confiscation, also contain such an implementing clause at the beginning. *Id.* arts. 4-5.

394. These include, for example, Article 6 on extradition, Article 7 on mutual legal assistance, Article 9 on other forms of cooperation, and Article 10 on international cooperation and assistance. *Id.* arts. 6-7, 9-10.

395. See *id.* arts. 2, 6. In any event, the domestic implementation clauses that are contained in and refer to other Convention articles are neither broad nor unqualified and thus do not deprive the articles to which they refer of their self-executing character. For example, the domestic implementation clause contained in Article 3, quoted *supra* note 393, should not render Article 3 non-self-executing. The language of the clause indicates that it is aimed at states that do not recognize the doctrine of self-executing treaties. See *supra* note 137 and accompanying text. Note the words "may be necessary," suggesting that Article 3 comes into force immediately if such implementing legislation is *not* necessary. See *supra* note 393; see also *supra* notes 130-42 and accompanying text (discussing this principle in more detail).

396. Cf. *BATOR ET AL.*, *supra* note 243, at 184-91 (discussing standing under the Constitution).

applying the plain meaning, drafting history, and purposes of the relevant articles and the Convention as a whole to a state-sponsored kidnapping. The plain meaning of Article 6.5 is that states have the right to "refuse extradition" on the grounds permitted by the requested state's domestic law or treaties.³⁹⁷ Reading Article 6.5 together with Article 6.10 indicates that one such common ground is that the fugitive sought is a national of the requested state.³⁹⁸ The Convention thus reaffirms the right of states to refuse extradition of their nationals if that right is provided by their respective domestic law or treaties.³⁹⁹ The plain meaning of Articles 2.2 and 2.3 prohibits any unauthorized foreign law enforcement operation on a party's territory.⁴⁰⁰ Article 2.2 repeats each nation's obligation under the U.N. Charter⁴⁰¹ concerning the inviolability of each nation's territorial integrity.⁴⁰² Whereas Article 2.2 states the general obligation to respect another country's territory, Article 2.3 specifically prohibits a state from exercising law enforcement powers in another state.⁴⁰³

397. See *supra* note 318 (quoting Articles 6.5 and 6.10 in full).

398. See *supra* note 318.

399. Treaties should be read in *pari materia* if they deal with the same subject. See generally EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 231 (1940) ("Statutes in *pari materia* [are] those which relate to the same matter or subject. They are to be construed together as if they constituted one act.").

400. U.N. Drug Trafficking Convention, *supra* note 6, arts. 2.2-3.

401. Article 2(4) provides as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4. Article 2(7) provides as follows:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id. art. 2, para. 7. Article 2(4) of the U.N. Charter has been construed to prohibit state-sponsored kidnapping in a foreign state. See *supra* note 330; see also CHARTER OF THE ORGANIZATION OF AMERICAN STATES, *supra* note 103, arts. 3, 18.

402. This paragraph appears to restate customary international law that prohibits territorial invasions. This prohibition has been construed to bar state-sponsored kidnapping. See *supra* note 297.

Article 2 reads: "The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." U.N. Drug Trafficking Convention, *supra* note 6, art. 2.2.

403. *Id.* art. 2.3.

Parsing Article 2.3 yields the following:

■“A Party *shall not* undertake in the territory of another Party”.⁴⁰⁴ Parties are expressly prohibited from engaging in certain conduct in the territory of another state party;

■“the exercise of jurisdiction”.⁴⁰⁵ States may not use their state power on another party’s soil. Given that the treaty deals exclusively with criminal law, the exercise of jurisdiction presumably means the exercise of law enforcement power;

■“and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law”⁴⁰⁶

The Convention deals solely with criminal law “[P]erformance of functions which are exclusively reserved for the authorities of that other Party by its domestic law” thus refers to law enforcement functions.

Law enforcement functions are “exclusively reserved”⁴⁰⁷ for the authorities of each state as a matter of custom and sometimes as a matter of statute.⁴⁰⁸ Read narrowly, paragraph 3 might limit

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *See id.* The Justice Department has implicitly recognized the territorial sovereignty of foreign states over law enforcement within their territory. The Department of Justice *Instructions to U.S. Marshals for Processing Requests for Serving American Judicial Documents Abroad* prohibits U.S. Marshals from “travel[ing] to foreign countries to deliver subpoenas in either criminal or civil cases.” SWEENEY ET AL., *supra* note 297, at 134-35 (quoting 16 I.L.M. 1331, 1338 (1978)) (requiring that U.S. Marshals receive the “express approval” of and “guidance by” the Director of the United States Marshals Service before serving subpoenas abroad).

Other countries have expressly forbidden foreign law enforcement agents from operating without consent. Article 271 of the Swiss Penal Code provides: “Whoever, without being so authorized, engages on Swiss territory on behalf of a foreign state in acts [the exercise of which] appertains to the [Swiss] public authorities shall be punished by imprisonment.” *Id.* at 134 (quoting 78 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC 851 (1974) (editors’ translation)).

Note also that Mexico’s domestic law impliedly prohibits foreigners from engaging in law enforcement functions in Mexico. Article 16 of the Mexican Constitution provides: “No one shall be disturbed in his person, family, domicile, documents or possessions except by virtue of a written order by the competent authority stating the legal grounds and justification for the action taken.” Brief for the United Mexican States as *Amicus Curiae* in Support of Affirmance at 15 n.8, *United States v. Alvarez-Machan*, 504 U.S. 655 (1992) (No. 91-712) (quoting Article 16 of the Mexican Political Constitution). Article 14 of the Ley de Extradicion Internacional (International Extradition Law) is equally clear: “No Mexican shall be extradited to a foreign state

"domestic law" to statutes, requiring the violated state to reserve expressly all law enforcement functions for its own authorities.⁴⁰⁹ By using the general term "domestic law,"⁴¹⁰ however, the drafters of the Convention presumably intended to encompass all categories of law, which include (in addition to statutes) constitutions, custom,⁴¹¹ court opinions, treaties, administrative regulations, administrative agency decisions, and executive orders.⁴¹²

Consideration of the plain meaning of paragraphs 2 and 3 together demonstrates that the parties intended to require law enforcement to respect the territory of other states and, in particular, to prohibit any law enforcement functions within another state's territory without that state's consent.⁴¹³ State-sponsored kidnapping is a major crime in the asylum state and violates national sovereignty, customary international law, and

except in exceptional cases in the discretion of the Executive." *Id.* at 14 n.6 (informal translation); see also SWEENEY ET AL., *supra* note 297, at 135-36 (reprinting a translation of an Austrian Supreme Court case from 1961 that appeared in 38 Int'l L. Rep. 133 (1969) (voiding the judgment against a German citizen tried on criminal charges in absentia because the German defendant had been served by mail in Germany in violation of German sovereignty and an international treaty)). But see SEC v. Briggs, 234 F. Supp. 618 (N.D. Ohio 1964) (finding that service by a British Columbia Deputy Sheriff on the defendant, a U.S. citizen, did not violate Canadian sovereignty); *contra* ITC v. Compagnie de Saint Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980) (holding that the mail service of a subpoena duces tecum in France on a French national was improper because it violated general principles of international law). For a discussion of *Compagnie de Saint*, see SWEENEY ET AL., *supra* note 297, at 137-38.

409. U.N. Drug Trafficking Convention, *supra* note 6, art. 2.3.

410. As noted in the previous section, in the final draft, "domestic law" was substituted for "national laws and regulations." See *infra* notes 530-32 and accompanying text. The original phrasing could have been interpreted as referring only to statutes and constitutions ("national laws"), as well as national administrative regulations, although "national" appears to modify both "laws" and "regulations." If the parties had intended to limit the term "domestic law" to national legislation, they could have kept the original wording or crafted more specific language to accomplish that result.

411. *Black's Law Dictionary* defines "custom and usage" as: "A usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates." BLACK'S LAW DICTIONARY 385 (6th ed. 1990) (citation omitted); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *68-70 (recognizing the importance of custom as law).

412. See WILLIAM P. STATSY, LEGAL RESEARCH AND WRITING 14-15 (3d ed. 1986).

413. U.N. Drug Trafficking Convention, *supra* note 6, arts. 2.2, 2.3.

treaties. Furthermore, this type of kidnapping is an illegal arrest and, as such, falls within the proscribed law enforcement functions.⁴¹⁴ Consequently, the plain meaning of the Convention bars state-sponsored kidnapping.⁴¹⁵

Aside from a strict plain meaning analysis, Supreme Court precedent and United States practice indicate that such an interpretation of Article 2's language is correct. From the early years of the Republic, the United States has both expressly and implicitly recognized that state sovereignty is inviolable and that law enforcement is an "exercise of jurisdiction and performance of functions exclusively reserved for the authorities of that other [country] by its domestic law"⁴¹⁶ When legal proceedings were brought against a French vessel of war, the Supreme Court, speaking through Chief Justice Marshall, observed that the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute."⁴¹⁷ A dozen years later, when United

414. Drug law enforcement operations include but are not limited to interviewing potential witnesses, obtaining and cultivating informants, placing agents undercover, executing searches of persons or places, maintaining surveillance of suspects, engaging in aerial surveillance and spraying of fields in which source crops are cultivated, searching and destroying cocaine growing and processing sites, arranging controlled drug purchases ("stings"), and arresting suspects. See JAMES N. GILBERT, CRIMINAL INVESTIGATION 365-77 (3d ed. 1993). State-sponsored kidnapping violates Article 2(4) of the U.N. Charter as well as Article 18 of the OAS Charter. *United States v. Toscanino*, 500 F.2d 267, 277-78 (2d Cir. 1974); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432(2) (1987).

415. Analyzing the plain meaning of Article 6 indicates that the Convention expressly preserves the rights of requested states to refuse to extradite their own nationals if their domestic law or treaties so provide. See U.N. Drug Trafficking Convention, *supra* note 6, art. 6. Reading Articles 2 and 6 together from a strictly plain meaning perspective thus indicates that the Convention bars state-sponsored kidnapping and impliedly protects from such kidnapping nationals of those states whose treaties or domestic law prohibits extraditing their own nationals. In other words, Article 2 alone does not necessarily make kidnapping victims intended beneficiaries of its provisions, but Article 6 implicitly makes the nationals of requested states such beneficiaries. See *id.* arts. 2, 6.

416. *Id.* art. 2.3.

417. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). In that case, Napoleon had added an American merchant vessel to his navy, having wrongfully seized it on the high seas. The vessel subsequently entered an American port, and the former owners brought a libel against it. The issue was whether the vessel was immune from suit, being part of the territory of France. Ruling affirmatively, the Court, in a preliminary part of the opinion, discussed the nature of a state's jurisdiction over its own soil and waters:

States tax agents seized a French ship from Florida (then Spanish territory) without Spanish consent, Justice Story, writing for the Court, concluded that the agents lacked the "power to arrest" within the exclusive territory of a foreign nation: "It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws."⁴¹⁸ Similarly, when

[A nation's jurisdiction over its territory] is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id. Articles 55 and 56 of the U.N. Charter, human rights conventions, and the Declaration on Human Rights, however, do limit a nation's sovereignty to a limited extent not relevant to the discussion here. See LILLICH & NEWMAN, *supra* note 14, at 148-49 (quoting Hauser, *United Nations Law on Racial Discrimination*, 1970 AM. SOC'Y INT'L L. PROC. 114, 114-18) (describing the doctrine of sovereignty as a "real problem").

418. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370-71 (1824). In that case, the *Apollon* was carrying a cargo bound for Charleston, South Carolina. Nearing Charleston, the captain learned that Congress had passed an act imposing punitive tariffs on cargoes carried by French ships. *Id.* at 364. The United States levied these tariffs in retaliation for France's imposition of restrictions on vessels carrying the United States flag. *Id.* at 375. Consequently, he changed course and landed in Florida, then a Spanish territory, and paid the applicable Spanish duties. *Id.* at 364. Without any authorization from Spanish authorities, United States tax agents later entered this Spanish territory, seized the ship, and brought it to Georgia for disposition. *Id.* at 365. The ostensible grounds for the seizure were the alleged attempt of the *Apollon* to evade the United States tariff. *Id.* While under Spanish control, Florida was apparently a staging point for extensive smuggling of goods into the United States. *Id.* at 374. The Court determined that the seizure was unlawful and ordered the return of the ship and the payment of damages. Justice Story reasoned that the seizure violated the law of nations.

But, even supposing, for a moment, that our laws had required an entry of the *Apollon*, in her transit, does it follow that the power to arrest her was meant to be given, after she had passed into the exclusive territory of a foreign nation? We think not. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.

Id. at 370-71. *But see* *The Merino*, 22 U.S. (9 Wheat.) 391 (1824); *The Richmond*, 13 U.S. (9 Cranch) 102 (1815) (holding that American-registered vessels seized in foreign waters by the U.S. Navy are subject to United States jurisdiction). The Supreme Court in *Cook v. United States*, 288 U.S. 102 (1933), distinguished *The Merino* and *The Richmond* on the ground that the vessels seized in those cases were American-registered and that "the seizures did not violate any treaty, but were merely violations of the law of nations because made within the territory of another sovereign." *Id.* at

the USSR attempted to kidnap a Soviet citizen from its Washington embassy, the State Department declared that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government" and, for this misconduct, expelled a Soviet diplomat.⁴¹⁹ These examples show that the United States regards law enforcement functions within a country's borders as "exclusively reserved" to that country.⁴²⁰

The Convention's drafting history supports the plain meaning interpretation that Article 2 and Article 6.5 bar state-sponsored kidnapping of a country's nationals. The United States played an active role on the losing side of both of these articles.⁴²¹ In a real sense, Article 2 was aimed at the United States. The Mexican delegate said that he was able to persuade delegation after delegation to support the proposed article because they feared that United States law enforcement, and the DEA in particular, would routinely overstep their authority⁴²² and encroach upon other countries' territory and nationals.⁴²³

The parties' overwhelming rejection of the United States' proposed amendment to Article 6.5 and their refusal to include even a hortatory provision concerning extradition of nationals suggests, among other things, an intent to protect a state's nationals from extradition.⁴²⁴ Given this history and the article's

122.

419. See *U.S. Rejects Soviet Charges Concerning Refusal of Two Russian Teachers To Return to Soviet Union*, DEP'T ST. BULL., Aug. 29, 1948, at 251, 253.

420. See U.N. Drug Trafficking Convention, *supra* note 6; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432(2) (1987) (noting that international law bars one state's exercise of law enforcement functions in another state absent that state's consent). "A state's law enforcement officers may *exercise their functions* in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." *Id.* (emphasis added). The language of the Restatement resembles that of Article 2.3. See U.N. Drug Trafficking Convention, *supra* note 6, art. 2.3.

421. See *supra* notes 318, 324 and accompanying text.

422. A DEA-sponsored kidnapping in a foreign state party's territory would be considered a direct affront to that country's sovereignty, repudiating typical arrangements made between other governments and the DEA and thereby violating Article 2. See U.N. Drug Trafficking Convention, *supra* note 6, art. 2; *infra* notes 454, 457.

423. Telephone Interview with Alberto Szekely, the Head of the Mexican Delegation to the Convention (July 24, 1994) [hereinafter Szekely Interview].

424. Many delegates to the Convention proposed the deletion of the original draft

text, one can infer that, at the very least, the parties implicitly intended to protect nationals against state-sponsored kidnapping, a much more egregious violation of both the rights of the national and her state.⁴²⁵ The Supreme Court in *Alvarez-Machain*, however, rejected such an argument.⁴²⁶ The Court refused to follow the Ninth Circuit's reasoning⁴²⁷ that the United States'

of Article 6.5, arguing that the original conflicted with their "constitution, national legislation, and customary legal practice." See 1 *Official Records*, *supra* note 318, at 36, para. 64. A few delegates argued that the proposed Article 6 infringed on the sovereignty of states and their right to refuse extradition. *Id.* at 36, para. 63. Those opposing the draft prevailed, and the amended proposal not only deleted the requirement of extraditing nationals, but also made extradition expressly subject to the requested state's domestic law and applicable treaties "including the grounds upon which the requested Party may refuse extradition." U.N. Drug Trafficking Convention, *supra* note 6, art. 6.5.

This history indicates that the majority intended to protect their nationals, given that their laws, treaties, and in some cases constitutions so protected them. The proposed draft would have been "contrary" to those laws. *Id.*, see 2 *id.* at 105-06, paras. 7-10 (statement of the Norwegian delegate on behalf of the Scandinavian countries) (expressing their intent to "protect[] the rights of the person," their national, from extradition). Even those delegates who based their opposition on the notion that the original draft infringed on sovereign discretion to refuse extradition implicitly intended to protect nationals as well. Treaties, like administrative regulations, may serve more than one purpose. See, e.g., *United States v. Rauscher*, 119 U.S. 407 (1886) (finding that an extradition treaty served to surrender fugitives to a requesting state but also protected individual fugitives from being tried for nonextraditable offenses); see Vázquez, *supra* note 63, at 1082-83. Administrative regulations may advance the general good and, at the same time, they may be invoked by one directly injured as a result of the government's violation of their rights. See, e.g., *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). Recognizing a state's right to refuse extradition of its nationals, the amended article thus implicitly protects this class of individuals.

425. U.N. Drug Trafficking Convention, *supra* note 6, at art. 6.5.

426. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

427. *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd and remanded*, 504 U.S. 655 (1992). Article 9 of the Extradition Treaty between the United States and Mexico provides as follows:

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

Alvarez-Machain, 504 U.S. at 663 (citation omitted) (quoting Extradition Treaty, May 4, 1978, [1979] U.S.-Mex., art. 9, 31 U.S.T. 5059, 5065).

abduction of a national would defeat the purpose of a provision prohibiting the extradition of nationals.⁴²⁸ The Court reasoned that Mexico had long known of the *Ker-Frisbie* doctrine⁴²⁹ and had never sought to negotiate an article prohibiting abductions.⁴³⁰

Unlike the bilateral extradition treaty in *Alvarez-Machain*, over 100 countries have signed the U.N. Drug Trafficking Convention.⁴³¹ Although a neighbor with whom we share a continent-

428. *Alvarez-Machain*, 504 U.S. at 667-68; see also *United States v. Matta-Ballesteros*, 71 F.3d 754, 762-63 (9th Cir. 1995) (holding that *Alvarez-Machain* compelled the rejection of a Honduran national's argument that his kidnapping from Honduras by United States Marshals divested the trial court of personal jurisdiction, given that the extradition treaty did not specifically prohibit forcible abduction of foreign nationals). Commentators have widely condemned the Court's interpretation of the extradition treaty. See, e.g., Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT'L L. 757 (1992); Hernan de J. Ruiz-Bravo, *Monstrous Decision: Kidnapping Is Legal*, 20 HASTINGS CONST. L.Q. 833 (1993); Andrew L. Strauss, *A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court's Abduction Decision in Alvarez-Machain*, 67 TEMP. L. REV. 1209 (1994); Hector H. Cárdenas, Jr., *Casenote*, *United States v. Alvarez-Machain: Result Oriented Jurisprudence*, 16 HOUS. J. INT'L L. 101 (1993); Brigitte B. Homrig, *Comment, Abduction As an Alternative to Extradition—A Dangerous Method To Obtain Jurisdiction over Criminal Defendants*, 28 WAKE FOREST L. REV. 671 (1993); Analisa W. Serimger, *Comment, United States v. Alvarez-Machain: Forcible Abduction As an Acceptable Alternative Means of Gaining Jurisdiction*, 7 TEMP. INT'L L. & COMP. L.J. 369 (1993); Stephanie A. Ré, *Recent Development, "The Treaty Doesn't Say We Can't Kidnap Anyone"—Government Sponsored Kidnapping As a Means of Circumventing Extradition Treaties*, 44 WASH. U. J. URB. & CONTEMP. L. 265 (1993). But see Halberstam, *supra* note 94 (defending the decision on political question grounds, an issue discussed *supra* note 94); Semmelman, *supra* note 227, at 517 n.23; Symposium, *Kidnapping Foreign Criminal Suspects*, 15 WHITTIER L. REV. 419 (1994) (containing the panel discussion comments of Manuel A. Medrano, federal prosecutor in *Alvarez-Machain*); Matorin, *supra* note 280, at 907; Edmund S. McAlister, *Note, The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, 43 DEPAUL L. REV. 449 (1994); Jacqueline A. Weisman, *Comment, Extraordinary Rendition: A One-Way Ticket to the U.S. or Is It?*, 41 CATH. U. L. REV. 149 (1991).

429. See *supra* note 192 and accompanying text.

430. *Alvarez-Machain*, 504 U.S. at 667-68. Ker, however, is distinguishable. Unlike the paid agents in *Alvarez-Machain*, the Pinkerton detective who kidnapped Ker was not ordered to do so by the United States government. See *supra* notes 192-227 and accompanying text. Note, however, that, on remand, the district court dismissed the case against defendant *Alvarez-Machain* on the ground of insufficient evidence. *HENKIN ET AL.*, *supra* note 161 (citing Seth Mydons, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20).

431. See U.N. Drug Trafficking Convention, *supra* note 6.

wide border and who is one of our chief trading partners may be deemed to know our law regarding the *Ker-Frisbie* doctrine, imputing such knowledge to all the parties to the Drug Trafficking Convention is much more difficult. Furthermore, the extradition treaty at issue in *Alvarez-Machain* did not contain an article equivalent to Article 2.⁴³² Like statutes, provisions in the same treaty should be read together to establish the drafters' intent and purpose.⁴³³ From the review session in which Article 2 was proposed to its final adoption by consensus, the drafting history materials indicate that the purpose of the article was to prevent

432. See *Alvarez-Machain*, 504 U.S. at 663 (quoting the treaty at issue).

433. As one commentator explained:

The Sutherland treatise identifies [four] approaches that have been used: [(i)] interpretation of each section in isolation from the others; [(ii)] interpretation of all the sections of each part of a statute together; [(iii)] resolution of ambiguities based upon the purposes and goals set forth in the preamble to the statute; and [(iv)] interpretation of each section in the context of the whole enactment. The treatise endorses the "whole act rule" as "the most realistic in view of the fact that a legislature passes judgment upon the act as an entity, not giving one portion of the act any greater authority than another. Thus any attempt to segregate any portion or exclude any other portion from consideration is almost certain to distort the legislative intent."

The U.S. Supreme Court agrees. "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature.'" The key to the whole act approach is, therefore, that all provisions and other features of the enactment must be given force, and provisions must be interpreted so as not to derogate from the force of other provisions and features of the whole statute."

WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 643-44 (2d ed. 1995) (quoting 2A SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 47.02 (Norman Singer ed., 5th ed. 1992); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)) (citations omitted). The government could argue that the whole act doctrine includes considering the preambles. The preamble to the U.N. Drug Trafficking Convention states that the parties "[r]ecognize[] that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority." See U.N. Drug Trafficking Convention, *supra* note 6, pmbl. Preambles yield to the provisions of the treaty or statute itself. Although Articles 2 and 6 counter the generally stated purpose given in the preamble, one may, in fact, construe those articles as consistent therewith, given the damage to international law enforcement efforts that a state-sponsored kidnapping may cause in the long run. See *infra* notes 454, 457.

foreign law enforcement agents from penetrating a state party's borders and carrying out law enforcement functions.⁴³⁴ The Court in *Alvarez-Machain* complained that, by basing the case on the bar against the extradition of nationals, *Alvarez-Machain* was asking the Court to make "a much larger inferential leap"⁴³⁵ than did the Court in *Rauscher* when implying a treaty right.⁴³⁶ Coupling Article 2 with Article 6 of the U.N. Drug Trafficking Convention shortens that leap to a mere step.

The Convention parties evidenced their intent to protect nationals from state-sponsored kidnapping far more strongly than the parties to the Webster-Ashburton Treaty did to protect extradited fugitives from being charged with non-extraditable

434. For the proposition that the prohibited law enforcement functions include state-sponsored kidnapping, see *supra* note 414 (noting that state-sponsored kidnapping violates U.N. and OAS charters); see also *supra* notes 322-50 and accompanying text (describing the drafting history of the Convention).

435. *Alvarez-Machain*, 504 U.S. at 669. Given the generality of the Webster-Ashburton Treaty at issue in *Rauscher* as compared to the more specific language of the Mexican-United States extradition treaty, the Court's complaint in *Alvarez-Machain* appears groundless. In regard to the U.N. Drug Trafficking Convention, the government could argue that Article 6 only applies to states whose domestic law or treaties prohibit them from extraditing their nationals. Nationals of countries like the United States, which generally extradite their own nationals, would not be protected from such abductions. Such an argument, however, should fail, because of lack of mutuality. See ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 152 (one vol. ed. 1952) (discussing mutuality of obligation); 1 *Official Records*, *supra* note 318, at 66, para. 102 (recording when a delegate from a country permitting extradition of nationals supported the deletion of the requirement: "[S]ince most of [the] other countries had legal obstacles to the extradition of nationals, the paragraph would in practice have no application because of lack of reciprocity."). Note, however, that the United States reservation expressly protects our nationals from extradition to countries with whom we do not have an extradition treaty and refuses to make the Convention operate as an extradition treaty with such countries. See *supra* note 317.

Civil-law countries generally prohibit the extradition of their nationals. Among those countries that prohibit extradition of their nationals are: Argentina, Brazil, Ecuador, Guatemala, The Netherlands, Norway, Panama, Peru, Poland, Sweden, Switzerland, Turkey, and Uruguay. See SATYA D. BEDI, EXTRADITION IN LAW AND PRACTICE 94 nn.52-54 (1968). Some other countries generally do not extradite their own nationals but provide limited exceptions when, under an international treaty or in other exceptional circumstances, they may grant extradition. Examples include: Hungary, Italy, Paraguay, El Salvador, and Mexico. *Id.* at 95 nn.55-57. Common-law countries generally permit the extradition of their nationals. These countries include Australia, Canada, India, Israel, the United Kingdom, and the United States. *Id.* at 97.

436. *United States v. Rauscher*, 119 U.S. 407 (1886).

offenses.⁴³⁷ In *Rauscher*, the treaty mentioned nothing more than the offenses that would form the basis of extradition.⁴³⁸ The Court, however, implied that the absence of other authorized offenses prohibited charging the defendant-fugitive for any other crimes.⁴³⁹ Likewise, in *Data Processing*⁴⁴⁰ and *Clarke*,⁴⁴¹ no evidence suggested that, by limiting the types of operations in which banks could engage, Congress intended to benefit either data processors or stockbrokers, respectively. In both cases, however, the Court concluded that these plaintiffs would suffer injury in fact and that they were direct, although unintended, beneficiaries of congressional enactments regulating the banking industry.⁴⁴² The data processors and stockbrokers thus were within the zone of interest arguably protected or regulated by the statute.⁴⁴³

If the DEA were to abduct a foreign drug suspect from her country, such a suspect would be able to show not only that she was a direct beneficiary of Articles 2 and 6, but also that the parties to the Convention implicitly intended to protect nationals like herself from state-sponsored kidnapping. She would satisfy not only the zone-of-interest test but also the higher, more difficult legally-protected-interest test.⁴⁴⁴ Because Articles 2.3 and 6.5 do not pose any separation-of-powers conflicts, because the Convention itself renders neither Article 2.3 nor Article 6.5 non-self-executing, and because foreigners kidnapped by United States agents from abroad have suffered injury in fact and are within the zone of interests protected by the Convention, they are entitled to invoke the Convention to challenge the jurisdiction of the trial court.

437. *See id.*

438. *See supra* notes 168-91 and accompanying text.

439. *See supra* notes 168-91 and accompanying text.

440. *See supra* notes 251-65 and accompanying text.

441. *See supra* notes 266-73 and accompanying text.

442. *See supra* notes 251-73 and accompanying text.

443. *See supra* notes 251-73 and accompanying text.

444. *See* *Investment Co. Inst. v. Camp*, 401 U.S. 617, 639 (1971) (Harlan, J., dissenting); *see also supra* notes 259-63 and accompanying text (discussing the evolution of the legally-protected-interest test).

D. Effectuating the Convention's Purpose and Promoting World Order and the Rule of Law

Construing the Convention to allow such abducted defendants to challenge jurisdiction likewise advances the Convention's general purpose to "promote co-operation" among nation-states in fighting the illicit drug trade.⁴⁴⁵ Taking Article 2.1 together with Articles 2.2 and 2.3 provides one of the Convention's fundamentals. Nations must work together to stop the international drug trade.⁴⁴⁶ To accomplish that result, nations must respect one another and, in particular, refrain from sending law enforcement agents onto the territory of another state that is a party to the Convention, at least not without that party's consent. Stemming the drug trade requires, among other things, detailed and accurate intelligence.⁴⁴⁷ United States drug enforcement agents cannot obtain this information on their own. They need the cooperation of law enforcement in source countries, in countries serving as transshipment points, and in countries where the drug money is laundered.⁴⁴⁸ Furthermore, law enforcement officials in the host countries and in the United States depend on civilians for a great deal of the necessary information.⁴⁴⁹

Encroaching on another country's soil and abducting a national from that country insults the host country's government and its

445. The Convention's purpose is to "promote co-operation" among states in order: (1) to enact a full panoply of laws targeting every actor in the illicit drug trade, including the grower, manufacturer, exporter, importer, distributor, street seller, and street user; (2) to extradite drug offenders; and (3) to help each other to gather evidence against drug offenders (for example, deposing witnesses and turning over suspects' bank accounts). See U.N. Drug Trafficking Convention, *supra* note 6, art. 2.1; *supra* notes 300-17 and accompanying text; *infra* note 525 (quoting Article 2.1 in full).

446. Some commentators note that unilateral interdiction can, in some cases, increase the profits of drug dealers by raising prices. See, e.g., Raphael F. Perl, *The United States*, in SCOTT B. MACDONALD & BRUCE ZAGARIS, INTERNATIONAL HANDBOOK ON DRUG CONTROL 67, 78 (1992) ("Interdiction as part of a coordinated plan [with other countries], however, can have a strong disrupting and destabilizing effect on trafficker operations.").

447. See Bruce Zagaris & Scott B. MacDonald, *Mexico*, in MACDONALD & ZAGARIS, *supra* note 446, at 187-88.

448. See *id.*

449. See CHARLES R. SWANSON ET AL., POLICE ADMINISTRATION 18-19 (3d ed. 1993) (discussing "community policing" in the United States).

people.⁴⁵⁰ Such a trespass tends to discourage that country's officials and civilians from cooperating with the United States.⁴⁵¹ Reacting to such a transgression, they may decide to withhold vital information from United States law enforcement.

By holding that the treaty bars state-sponsored kidnapping of nationals, the Court would thus effectuate one of the purposes of the treaty—that of fostering international cooperation in combatting the illegal drug trade. Such a holding is consistent with the plain meaning interpretation of Articles 2 and 6, as well as with the drafting history of those two articles.⁴⁵² In addition, such a holding would also carry out one of the purposes of the Supremacy Clause—that of reducing conflict with other countries.⁴⁵³

If, in attempting to stop the illicit drug trade, the United States runs roughshod over international law by kidnapping individuals from foreign states in violation of treaty and international custom, our reputation as a law-abiding nation suffers. We justifiably condemn states that engage in international lawlessness, including state-sponsored abductions, assassinations, and other acts of terrorism. By violating a treaty—particularly one that we sponsored—the United States would be creating a double standard.⁴⁵⁴ It is then hypocritical to protest other states who

450. Witness Mexico's reaction to the Supreme Court's ruling in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). See *infra* notes 454, 457 and accompanying text.

451. See *infra* notes 454, 457 and accompanying text.

452. See U.N. Drug Trafficking Convention, *supra* note 6; *supra* part IV.B.

453. THE FEDERALIST No. 80, at 534-36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

454. The Supreme Court's decision in *Alvarez-Machain* outraged most Mexicans. They viewed the decision as condoning trespass by United States law enforcement, a kind of trespass that they felt would have brought certain and swift retribution had Mexico kidnapped an American citizen and brought her to Mexico for trial. Mexicans were particularly incensed, given their fairly vigorous prosecution of drug offenders involved in the Camarena torture and killing. Nine of the perpetrators were given jail sentences, at least one of the perpetrators being sentenced to a term of 40 years, see *United States v. Alvarez-Machain*, 504 U.S. 655, 671 (1992) (Stevens, J., dissenting), the maximum term available under Mexican law, cf. *Mexicans Given 40 Years for Killing Agent*, WASH. POST, Dec. 13, 1989, at A32 (emphasizing the lack of opportunity for parole).

For days following the case, Mexican newspapers headlined the Supreme Court's decision. A columnist from *El Excelsior*, a major daily newspaper of Mexico City, began his June 30, 1992, column as follows: "[The more than 100 countries which have extradition treaties with the United States can throw them in the garbage]." Martin

violate treaties of vital interest to us.⁴⁵⁵ Given our initial posi-

L. Guzman Ferrer, *Matanga Dijo la Changa*, EL EXCELSIOR, June 30, 1992, at 7-A, 7-A (translation by Author). He noted that the Supreme Court's decision "[affronts the entire world community, not just Mexico. But there's no doubt that the kidnapped victims are Mexicans, not Chinese. Furthermore, let's see if the Drug Enforcement Agency will dedicate itself to kidnapping Swiss, Swedish or Saudi citizens]." *Id.* (translation by Author); see also David Aponte, *Difícil Momento Vive la Relación México-EU: Solana*, EL UNIVERSAL, June 28, 1992, at 1 (quoting Mexico's Secretary of State as having said that the *Alvarez-Machain* case had provoked one of the gravest crises between the two countries and that "[it is essential to reach a solution that assures unrestricted respect for Mexican territorial jurisdiction to emphasize the international concern that the 'law of the jungle' is encroaching upon law and order]") (translation by Author); Eduardo Chimely, *Pide la Corte Suspender Plagios*, EL EXCELSIOR, June 28, 1992, at 1, 10 (discussing Mexican religious leaders who condemned the decision as violative of sovereignty and human rights); *Deshonro a EU su Pretensión de Jurisdicción Extraterritorial*, PUNTO, June 29, 1992, at 1, 13 (containing a lead headline in 36-point type on page one that stated: "Deshonró a EU su pretensión de jurisdicción extraterritorial [U.S. dishonors itself with its pretension of extraterritorial jurisdiction]") (translation by Author); Carlos Fazio, *Barr, el Justiciero*, EL FINANCIERO, June 30, 1992, at 47 (condemning the *Alvarez-Machain* decision as imperialistic and contemptuous of international law and concluding that "[the logic of Attorney General Barr [who in an advisory opinion asserted the legality of state-sponsored abductions]—the end justifies the means—is comparable to that of Libyan kidnappers and other terrorists roundly condemned by the United States]") (translation by Author); *Tratado sin Honor*, PUNTO, June 29, 1992, at 2 (containing an editorial denouncing the opinion as violating the extradition treaty and questioned the United States' willingness to meet treaty obligations).

Canada, Colombia, and numerous other countries also denounced the decision. Alan J. Kreczko, *The Alvarez-Machain Decision*, U.S. DEP'T ST. DISPATCH 614, 615 (1992). The presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay all requested that the case be referred to the OAS. *Id.*, *El Fallo de la Suprema Corte de EU Sobre los Secuestros, Tema de la Cumbre del Cono Sur*, EL EXCELSIOR, June 28, 1992, at 10-A.

455. United States companies lose a conservatively estimated one billion dollars annually from Chinese concerns' manufacturing pirated software, compact discs, and video cassettes in violation of the international copyright conventions and the Memorandum of Understanding Between China and the United States signed in January 1992. Seth Faison, *Copyright Pirates Prosper in China Despite Promises*, N.Y. TIMES, Feb. 20, 1996, at A1 (noting that China's copyright enforcement efforts have been weak); Margaret McKeown & H. Ping Kiang, *IP Protections in China—Reality or Virtual Unreality*, LEGAL TIMES, May 15, 1995, at 8; Wanda Szeto, *Undercover Bid To Find China's Disc Pirates*, S. CHINA MORNING POST, Aug. 14, 1995, at 3, available in LEXIS, News Library, SChina File (relating how Windows 95 "turned up" in local Chinese computer stores "two weeks before its official launch"); see also Julia Preston, *As Piracy Grows in Mexico, U.S. Companies Shout Foul*, N.Y. TIMES, Apr. 10, 1996, at 1 (estimating that United States companies lose \$485 million each year because of pirated compact discs, video cassettes, and computer software copied in Mexico).

tions on the proposed Articles 2 and 6,⁴⁵⁶ refusing to honor them suggests that we do not take our obligations under the Convention seriously. If we can disregard those provisions that we dislike, other parties to the Convention may do likewise, thereby weakening the Convention and international law generally.⁴⁵⁷

Failing to permit individuals to invoke Articles 2 and 6 would increase the likelihood that such international law violations will go unaddressed.⁴⁵⁸ Public clamor about the insidious effects of

456. See *supra* part IV.B.

457. One prominent Mexican scholar responded to the *Alvarez-Machain* decision as follows: "We are offended by this imperialistic judgment. We understand your anger, but not your methods. There is no difference ethically between what terrorists do and what the U.S. has done." Interview with Dr. Victor C. Garcia-Moreno, Professor of International Law at University Autonoma of Mexico, Mexico City, Mex. (July 22, 1992) (noting that Mexico is worried about whether the United States "will keep its word" and stating that—assuming that the evidence was sufficient—Mexico would have prosecuted Alvarez-Machain).

In response to Mexican complaints regarding the Alvarez-Machain kidnapping and the Supreme Court decision, the United States negotiated and signed a treaty with Mexico outlawing such abductions. See Marcus Stern, *Zedillo Concerned That Prop. 187 Could Become National Policy*, SAN DIEGO UNION, Nov. 24, 1994, at A-18. President Clinton, however, has not submitted the treaty (called "The Abduction Treaty") to the Senate for ratification because of a dispute with Mexico concerning Mexico's apparent renegeing on a promise to extradite one of its nationals suspected in the United States of raping a minor. Tim Golden, *Dispute Holds Up U.S. Extradition Treaty with Mexico*, N.Y. TIMES, May 15, 1994, § 1, at 6; Doyle McManus, *Reno To Protest Mexico's Plan To Withhold Suspect in Rape*, L.A. TIMES, May 9, 1994, at A-4. If and when submitted, the treaty faces an uncertain fate in the Senate. See *EXTRADITION: Congress Is Right To Turn Up the Heat on Mexico*, DALLAS MORNING NEWS, Feb. 12, 1995, at 2J (noting the initial opposition of Jesse Helms, Chair of the Senate Foreign Relations Committee, because of Mexico's refusal to extradite one of its nationals who allegedly raped a California girl).

458. The plain meaning and drafting history of the Supremacy Clause implicitly view individuals and the judiciary as helping to enforce treaty obligations. See *supra* part II.A.2.a. The Haitian refugee case illustrates this principle. See *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993); *supra* note 154 (discussing *Sale*). Neither President Bush nor President Clinton was willing to carry out the United States' obligations under the Protocol protecting refugees, see Protocol Relating to the Status of Refugees, *supra* note 98, presumably because of the broad public opposition to the immigration of Haitian refugees, see Steven A. Holmes, *Pressure Builds over Return of Boat People to Haiti*, N.Y. TIMES, Dec. 17, 1993, § 1, at A17; *The Truth Rebuked on Haiti*, N.Y. TIMES, Dec. 17, 1993, § 1, at A38. In one of its most strained interpretations of a treaty in recent memory, the Supreme Court upheld the Administration's interdiction of the Haitians on the high seas and their forced return to Haiti without even a cursory check to determine whether any of the refugees qualified for political asylum. *Sale*, 113 S. Ct. at 2567. Had the Supreme Court

illicit drugs has, unfortunately, often drowned out those who call for respecting international law and protecting basic human and constitutional rights. Sensing the majority will, low-level law enforcement officials may be tempted to engage in foreign adventuring at the cost of future law enforcement benefits, thereby eroding respect for the rule of law⁴⁵⁹ Given the unappealing character of abducted drug defendants, the executive branch may be unwilling to enforce our international obligations vigorously

Those who argue that state-sponsored kidnapping prevents drug dealers from seeking havens in sympathetic states⁴⁶⁰ put short-term results ahead of long-term solutions.⁴⁶¹ Kidnapping weakens the Convention because it leads to distrust and disrespect, thereby erecting barriers to communication, cooperation, and exchange of information. If the United States abducts drug suspects in violation of the Convention, countries like the

followed the clear language of the treaty, language that was consistent with the treaty's purpose, the Court would have helped the United States to comply with its treaty obligations. The Court in *Sale*, however, abdicated its responsibilities as an impartial arbiter of the law.

459. Alvarez-Machain made this argument in his brief in the United States Supreme Court. Respondent's Brief at 13, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712).

460. See Semmelman, *supra* note 227, at 563; Symposium, *supra* note 428, at 427-28 (recounting the assertions of Alvarez-Machain's prosecutor that the brutal nature of Enrique Camarena's killing, official Mexican corruption, and the ability to deter traffickers from similarly torturing and murdering our agents in other cases justified Alvarez-Machain's abduction); Matorin, *supra* note 280, at 931-32; Weisman, *supra* note 428, at 173. Admittedly, the safe havens argument is not a frivolous one. Certain countries do play this role, and some government officials are subject to corruption. Resorting to the expedient of a state-sponsored kidnapping rather than to lawful bilateral and multilateral remedies, however, generally undermines over the long term, effective international law enforcement efforts. See *infra* notes 461-67 and accompanying text.

461. Countries that establish havens for major drug traffickers may be subject to enforcement measures under Chapter VII of the U.N. Charter. U.N. CHARTER art. 41; cf. G.A. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 52, U.N. Doc S/Res/47th (1992) (imposing economic sanctions on Libya for its refusal to surrender two fugitives charged with complicity in the bombing of Pam Am Flight 103, the Lockerbie case). Providing havens for such operators may constitute a sufficient "threat to peace" to trigger U.N. sanctions. Cf. G.A. Res. 48, *supra* (citing such a threat as the basis for the Security Council's sanctions). The United States also can unilaterally impose trade sanctions on such haven countries and attempt to get its allies to do likewise. See U.N. CHARTER art. 52, para. 1.

Bahamas can equally justify refusing to provide access to banking records. Ending bank secrecy and thereby making money laundering far more difficult was one of the Convention's major achievements and a long-sought goal of United States law enforcement.⁴⁶² State-sponsored kidnappings over time, therefore, act as a drag on effective international law enforcement⁴⁶³

462. Cf. U.N. Drug Trafficking Convention, *supra* note 6 (making criminal the conversion or concealment of property obtained from drug trafficking activities).

463. State-sponsored kidnappings may thwart effective multilateral law enforcement efforts. For example, the United States focuses much of its drug interdiction effort on the Americas—Mexico, Central America, and South America. See Zagaris & MacDonald, *supra* note 447, at 188. Some Latin American countries, however, have been less than stalwart allies in the United States' war against drugs. See *id.* Because most of these countries do not have a major domestic drug problem comparable to that of the United States, they have viewed the drug crisis as our problem: if the demand went down, the drug problem would disappear. *Id.* at 190; GILBERT, *supra* note 414, at 366 (“[M]any South American countries have not viewed the narcotics problem as having the same urgency as in the United States.”). Increasingly, Mexico has treated the production and distribution of drugs seriously. *Id.* Jim Kolbe, the Republican Congress member who sponsored a bill to stop such kidnappings in the future, noted that Mexico has become a key fighter in the war against drugs. Mary Benanti, *Kolbe Calls for Clarification of Mexico Extradition Treaty*, Gannett News Serv., June 19, 1992, available in LEXIS, News Library, Gns File; Sam Dillon, *Mexico Arrests a Top Suspect in Drug Trade*, N.Y. TIMES, Jan. 16, 1996, at A1 (relating how Mexico arrested and handed over to United States authorities Juan Garcia Abrego, who was on the FBI's “10 most-wanted List” and who was accused of being “one of the hemisphere's most powerful and murderous drug lords”); Ann Devroy & Pierre Thomas, *Clinton Advised To Certify Mexico As Cooperative in Drug War*, WASH. POST Mar. 1, 1996, at A19 (relating how Clinton Administration officials have determined that, despite having an important role as a conduit of illicit drugs to the United States, Mexico has “made strides in its anti-narcotics efforts”); *Habr  Nueva Audiencia del Congreso para Angalizar el Caso Alvarez M chain*, EL NACIONAL, June 30, 1992, at 13; Jorge Pinto, *Credit Mexico for Drug War Successes*, N.Y. TIMES, Aug. 7, 1995, § 1, at A12 (noting that, in 1994, Mexican authorities confiscated drugs with a street value of nearly \$100 billion). But see Symposium, *supra* note 428, at 428-29 (alleging official corruption in Mexican drug enforcement efforts); Sam Dillon, *Mexicans Tire of Police Graft As Drug Lords Raise Stakes*, N.Y. TIMES, Mar. 21, 1996, at A3 (alleging institutional corruption in Mexico's police forces); Tim Golden, *To Help Keep Mexico Stable, U.S. Soft-Pedaled Drug War*, N.Y. TIMES, July 31, 1995, at 1; David Johnston, *Clinton Urged To Cite Mexico for Drug Flow*, N.Y. TIMES, Feb. 18, 1996, at 1, 12 (noting that some unnamed United States narcotics officials are concerned about the growth of Mexican drug cartels). Mexico can serve as an honest broker between the United States and other Latin American source and transshipment countries. By taking strong steps against drug trafficking and production, Mexico, an admitted leader in Latin America, is well positioned to encourage other Latin American countries to do likewise. Zagaris & McDonald, *supra* note 447, at 190. The diplomacy of the United States may not be as effective in these countries as Mexico's example and effort. A series of state-sponsored

in much the same way that a hostile police force entering a minority community often provokes resentment, causing the community to refuse to cooperate with the police,⁴⁶⁴ resulting in fewer arrests and convictions. As *Alvarez-Machain* illustrates,⁴⁶⁵ such a policy may not be limited to states who are sympathetic to the illicit drug trade but may embrace allies committed to the fight against illicit drugs and psychotropic substances.

Justice Brandeis, though in a domestic context, conveyed the consequences of government agents' violation of the law in the name of enforcing the law:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.⁴⁶⁶

The United States has a long tradition of using law to resolve disputes at home.⁴⁶⁷ Justice Brandeis's words apply equally to how we conduct ourselves toward other countries and their citizens in the increasingly small and interdependent global community

kidnappings, however, might dissuade Mexico from zealously cooperating with the United States on international drug enforcement. Senate ratification of the Abduction Treaty, *see supra* note 457, may end the controversy concerning the abduction of Mexicans from their country, but whether the President will submit the treaty to the Senate or whether the Senate will ratify it is by no means certain.

464. *See, e.g.,* Dwight L. Greene, *Foreword: Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 HOFSTRA L. REV. 457, 491 (1990). If the United States wished to arrest a major trafficker who fled to Mexico, some Mexicans, resentful of the U.S. kidnapping of Alvarez-Machain, might refuse to come forward with information about the major trafficker.

465. *See* *United States v. Alvarez-Machain*, 504 U.S. 655, 668-70 (1992); Zagaris & MacDonald, *supra* note 447, at 188.

466. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

467. *See supra* notes 187-91 and accompanying text.

V CONCLUSION

By violating the Treaty of Peace of 1783 with Great Britain, the individual confederated United States provoked British retaliation and risked the fruits of the hard-won independence.⁴⁶⁸ During the Constitutional Convention in 1787 and the states' ratification process, which lasted until 1788, the Framers were keenly aware of the dangerous consequences of violating treaties.⁴⁶⁹ As a result, they made treaties the supreme law of the land,⁴⁷⁰ enforceable by individuals in state and federal courts.⁴⁷¹ Because the states had violated the Tories' treaty rights, the Framers particularly wanted to ensure that Tories and other foreigners would have access to our courts.⁴⁷² Empowered to invoke treaties, the Framers believed that these foreigners would be less likely to complain to their home countries about maltreatment at the hands of the United States.⁴⁷³ If our government infringes upon foreigners' rights, the potential for international conflict is greater than if private parties do so.⁴⁷⁴ Consequently, when a foreigner invokes a treaty to defend against a governmental proceeding, the court should presume that the treaty or relevant treaty provision is self-executing. The government may rebut the presumption of self-execution only upon showing that (1) the treaty or relevant treaty provision manifestly makes itself non-self-executing by its own terms, (2) enforcing the treaty would violate the Constitution's separation of powers, or (3) the individual defensively asserting the treaty provision is not arguably within the zone of interests protected by the treaty or treaty provision in question.⁴⁷⁵

The history of Articles 2 and 6 of the U.N. Convention Against

468. *See supra* notes 26-53 and accompanying text.

469. *See supra* notes 51-74 and accompanying text.

470. *See supra* notes 53-56 and accompanying text.

471. *See supra* note 63 and accompanying text.

472. *See supra* note 63 and accompanying text.

473. *See supra* note 63 and accompanying text.

474. *Cf. supra* note 63 and accompanying text (discussing Alexander Hamilton's concern over foreigners' complaints to their home countries regarding unjust treatment at the hands of the American government).

475. *See supra* notes 237-43 and accompanying text.

Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁴⁷⁶ demonstrates that the articles neither pose a separation-of-powers conflict nor make themselves non-self-executing by their own terms.⁴⁷⁷ Furthermore, reading Articles 2 and 6 together shows that the parties implicitly intended to protect their nationals from state-sponsored abductions.⁴⁷⁸ Articles 2 and 6 are thus self-executing. Co-sponsored by our neighbors, Canada and Mexico, Article 2 underscored fears that United States agents would disregard boundaries and trample upon sovereign rights of other countries and their nationals.⁴⁷⁹ Article 2 was a quid pro quo to the parties' acceptance of their other obligations under the Convention, the most sweeping criminal-law convention ever agreed upon. Coincidentally, not only did the United States strenuously oppose the proposed Article 2,⁴⁸⁰ but we also vigorously supported a much stricter draft of Article 6, requiring states to extradite their nationals.⁴⁸¹ Defeated on both counts, the United States would appear to be mocking the Convention and the rule of law if our agents kidnap foreign nationals from their countries in an apparent attempt to overcome our losses at the conference table.

Given the Framers' intent to avoid conflict with foreign governments, courts should allow foreign nationals who are the direct objects of our government's treaty violations to invoke the treaty to challenge a court's jurisdiction over them and to obtain a dismissal and an order returning them to the asylum country. Such a result helps fulfill the United States' treaty obligations, avoids friction with other countries, and aids in effectuating the Convention by promoting cooperation among the parties in the fight against the illicit drug trade. Lastly, such a result advances respect for the rule of law, particularly given the United States' stance towards Articles 2 and 6 when proposed. As Judge Oakes of the Second Circuit stated concerning a state-sponsored abduction in another context:

476. U.N. Drug Trafficking Convention, *supra* note 6, arts. 2,6.

477. *See supra* part IV.B.

478. *See supra* part IV.B.

479. *See supra* notes 329-50 and accompanying text.

480. *See supra* notes 324, 328 and accompanying text.

481. *See supra* note 318 and accompanying text.

That respect for the sovereign integrity of other nations is, in addition to conforming to high moral principles, a self-serving pragmatic viewpoint for the United States to take; we can better demand in the international court of public opinion similar respect for our sovereign integrity if we extend such respect to others.⁴⁸²

482. *United States v. Lira*, 515 F.2d 68, 73 (2d Cir.) (Oakes, J., concurring), *cert. denied*, 423 U.S. 847 (1975).

APPENDIX

Drafting History of Article 2 of the U.N. Drug Trafficking Convention

The full text of Mexico's original proposal is as follows:

SCOPE OF THE CONVENTION

In full compliance with the principles of international law regarding legal equality and sovereign equality of States, as well as the principle of non-intervention in domestic affairs which are essentially within the exclusive competence of States, the Parties agree that:

1. This Convention constitutes an instrument of international co-operation, aimed at ensuring maximum effectiveness in the struggle of the States Parties against the illicit traffic in narcotic drugs and psychotropic substances, in all aspects of the problem as a whole, in all cases within [sic] the most strict respect for, and in full compliance with, the limits set by the provisions of the respective internal legal system of each State Party, and in the framework of applicable treaties in force on the matter.
2. Nothing in this Convention empowers, in any way whatsoever, the authorities of one of the States Parties to undertake, to attempt to undertake or to exercise pressure in order to be allowed, in the territorial jurisdiction of any of the other States Parties, the exercise and performance of functions whose jurisdiction or competence are exclusively reserved to the authorities of each of those other States Parties by their respective national laws and regulations.
3. This Convention in no case implies and cannot be interpreted in the sense that, in order to comply with it, a State Party has undertaken, by virtue of its provisions, to take measures itself or to authorize measures in its territorial jurisdiction which in any way exceed its legal jurisdiction or competence, or which in any other manner are not expressly permitted by its legal provisions in force, or which may, in the judgment of that State Party, prejudice its security, public order or any

other essential interest.

4. In conformity with the above paragraphs, none of the provisions of this Convention shall be invoked or utilized as a pretext to attempt to go beyond the precise limits of its scope, in contravention of the provisions of this article.⁴⁸³

The Canadian-Mexican amendment changed the original as follows:

1. This Convention constitutes an instrument of international co-operation, aimed at ensuring maximum effectiveness in the struggle of the States Parties against the illicit traffic in narcotic drugs and psychotropic substances,⁴⁸⁴ ~~in all aspects of the problem as a whole, in all cases within [sic] the most strict respect for and in full compliance with the limits set by the provisions of the respective internal system of each State Party, and in the framework of applicable treaties in force on the matter.~~⁴⁸⁵ Its provisions are directed at all aspects of the problem with strict respect for the provisions of the internal system of each State Party.⁴⁸⁶

The Canadian-Mexican amendment collapsed paragraphs 3 and 4 of the original into the second paragraph:

~~3. This convention in no case implies and cannot be interpreted in the sense that, in order to comply with it, a State Party has undertaken, by virtue of its provisions to take measures itself or to authorize measures in its territorial jurisdiction which in any way exceed its legal jurisdiction or competence, or which in any other manner are not expressly permitted by its legal provisions in force, or which may, in the judgment of that state Party, prejudice its security, public order or any other essential interest.~~⁴⁸⁷

~~4. In conformity with the above paragraphs, none of the provisions of this Convention shall be invoked or utilized as a pretext to attempt to go beyond the precise limits of its scope,~~

483. 1 *Official Records*, *supra* note 318, at 76.

484. *Id.*

485. *Id.*

486. *Canadian & Mexican Amendment*, *supra* note 328.

487. 1 *Official Records*, *supra* note 318, at 76.

~~in contravention of the provisions of this article.~~⁴⁸⁸

2. Nothing in this Convention derogates from the principles of the sovereign equality and territorial integrity of States or that of non-intervention in the domestic affairs of States.⁴⁸⁹

The Canadian-Mexican amendment moved the second paragraph to the third paragraph:

2. 3. Nothing in this Convention empowers,⁴⁹⁰ ~~in any way whatsoever,~~⁴⁹¹ the authorities of one of the States Parties to undertake,⁴⁹² ~~to attempt to undertake or to exercise pressure in order to be allowed,~~⁴⁹³ in the territorial jurisdiction of any of the other States Parties, the exercise and performance of functions whose jurisdiction or competence are exclusively reserved to the authorities⁴⁹⁴ of ~~each of~~⁴⁹⁵ those other States Parties by their respective national laws and regulations.⁴⁹⁶

The first paragraph of the Canadian-Mexican proposal was modified slightly by Canada and Mexico shortly after it was proposed. As amended, the proposed article read:

1. This Convention constitutes an instrument of international co-operation, aimed at ensuring maximum effectiveness in the struggle of the States Parties against the illicit traffic in narcotic drugs and psychotropic substances.⁴⁹⁷ ~~Its provisions are directed at all aspects of the problem with strict respect for the provisions of the internal system of each State Party.~~⁴⁹⁸ Its provisions, which are directed at all aspects of the problem, establish obligations which are to be implemented and executed with strict respect for the provisions of the internal system of each State Party.⁴⁹⁹

488. *Id.*

489. *Canadian & Mexican Amendment*, *supra* note 328.

490. 1 *Official Records*, *supra* note 318, at 76.

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. *Canadian & Mexican Amendment*, *supra* note 328.

497. 1 *Official Records*, *supra* note 318, at 76.

498. *Id.*

499. *Amendment Submitted by Canada and Mexico*, United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic

A few days later, forty-two countries, including Canada and Mexico, again amended the first paragraph, also modifying the second sentence of that paragraph. In this amendment, that sentence read as follows: "Its provisions, which are directed at all aspects of the problem, establish obligations which are to be implemented and executed with strict respect for the *fundamental* provisions of the internal legal system of each State Party"⁵⁰⁰

The United States continued to oppose the proposed article. The United States delegate stated:

95. Mr. Newlin (United States of America) said that his delegation was opposed to the article 1 *bis* set forth in document E/CONF.82/C.1/L.1/Rev.2. [The United States delegation] believed that the convention did not need an article on its scope. Moreover, several parts of the proposed article were already covered by existing provisions. For example, the first sentence of paragraph 1 and the whole of paragraph 2 were more suitable for the preamble to the convention. As to the second sentence of paragraph 1, it could be interpreted as a saving clause which would call into question the obligations of the Parties under the convention to change their national legislation in order to bring it into conformity with the convention. That result might not have been the one intended by the original sponsors of article 1 *bis* but it was unfortunately a possible interpretation of the sentence in question. It was also highly questionable whether a safeguard clause of a general character in article 1 was needed when there were already safeguard clauses in a number of articles of the convention, such as articles 2, 3, 4 and 5.

96. Paragraph 3 of the proposed article 1 *bis* dealt with a very minor issue which was already covered by article 6, paragraph 1(a).

97 In conclusion, all the elements in the proposed article 1 *bis*

Substances, U.N. Doc. E/CONF.82/C.1/L.1/Rev.1 (1988) (amended language shaded, original language struck).

500. *Amendment Submitted by Afghanistan et al.*, United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/C.1/L.1/Rev.2 (1988) (amended language emphasized).

were either unnecessary because they were to be found elsewhere in the draft or undesirable because they were likely to have harmful consequences on the convention if adopted. He accordingly urged the Committee to reject the proposal.⁵⁰¹

The United Kingdom submitted an amendment to modify the second sentence of the first paragraph. Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Spain, and Sweden also sponsored the United Kingdom's amendment. The U.K.'s amendment substituted the following language for the second sentence of the first paragraph: "In implementing and executing their obligations under the Convention, States Parties shall take any necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their internal legal systems."⁵⁰²

The U.K.'s amendment appeared to attempt to strike a balance between requiring state parties to fulfill their obligations under the Convention and recognizing the constitutional limitations of the individual states. Three days later, the United States introduced its own proposal. In offering the proposal, the United States delegate explained that the United States wanted to change the tone of the proposal from the negative to the positive:

5. Mr. MEYER (United States of America) said that his delegation did not believe that an article on the scope of the convention was necessary in an instrument of the present type, although he saw merit in the amended text referred to by the previous speaker [the U.K. delegate]. The main difficulty which his delegation found with that text was the prevailing negative tone of the wording. It had accordingly redrafted the text with the aim of giving it a more positive mode of expression.⁵⁰³

Retaining the United Kingdom's language in the second sentence of paragraph 1, the United States proposal changed the language of the *first* sentence of paragraph 1.

501. 2 *Official Records*, *supra* note 318, at 156.

502. *Id.*

503. *Id.* at 171.

~~1. This Convention constitutes an instrument of international co-operation, aimed at ensuring maximum effectiveness in the struggle of the States Parties against the illicit traffic in narcotic drugs and psychotropic substances.~~⁵⁰⁴ The purpose of the present Convention is to assist States Parties to address more effectively the various aspects of the drug abuse problem having an international dimension.⁵⁰⁵ In implementing and executing their obligations under the Convention States Parties shall take any necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their internal legal systems.⁵⁰⁶

The United States' proposed second paragraph phrased the state parties' obligations affirmatively rather than negatively:

~~2. Nothing in this Convention derogates from the principles of the sovereign equality and territorial integrity of States or that of non-intervention in the domestic affairs of States.~~⁵⁰⁷ States Parties shall carry out their obligations under the present Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.⁵⁰⁸

As to the last paragraph, the United States proposal tightened up the language, omitting some verbose phrasing, without altering the substance of the original:

~~3. Nothing in this Convention empowers the authorities of one of the States Parties to undertake, in the territorial jurisdiction of any of the other States Parties, the exercise and performance of functions whose jurisdiction [sic] or competence are exclusively reserved for the authorities of those other States Parties by their national laws and regulations.~~⁵⁰⁹ A State Party to the present Convention shall not undertake in the territory of another State Party the independent exercise and perfor-

504. 1 *id.* at 76.

505. 2 *id.* at 171.

506. *Id.* at 156.

507. *Canadian & Mexican Amendment*, *supra* note 328.

508. 2 *Official Records*, *supra* note 318, at 171.

509. *Canadian & Mexican Amendment*, *supra* note 328.

mance of functions which are reserved for the authorities of that other State Party by its national law and regulations.⁵¹⁰

Note that the word "independent" was added to paragraph 3 to include the possibility of joint operations. Delegate Meyer explained the change as follows:

9. One slightly new element had been introduced into paragraph 2, namely the word "independent", which was intended to ensure that there was no possible conflict between article 1 *bis* and article 6, which dealt with joint operations. Apart from that, no element previously present in the 42-nation proposal had been omitted or modified.⁵¹¹

After subsequent consultation with some of the delegates, apparently including Mexico and Canada,⁵¹² the United States modified its proposed scope article, dropping, among other things, the word "independent."⁵¹³ Mr. Meyer explained the modifications as follows:

2. Mr. MEYER (United States of America) said that, as a result of consultations with other delegations on the text of his proposals, he had introduced some changes which he hoped would make a consensus on article 1 *bis* more likely. The revised text was before the Committee in document E/CONF.82/C.1/L.38. The Committee would note that, in the first sentence of paragraph 1, the words "to assist States Parties to address more effectively" now read "to promote cooperation among States Parties so that they may address more effectively." In paragraph 3, the words "the independent exercise and performance of functions which are reserved for the authorities" had been amended to read "the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities."⁵¹⁴

As amended, the United States proposal read as follows:

510. 2 *Official Records*, *supra* note 318, at 171.

511. *Id.*

512. *Id.* at 176.

513. *Id.*

514. *Id.*

1. The purpose of the present convention is⁵¹⁵ ~~to assist the States Parties address more effectively~~⁵¹⁶ to promote cooperation among States Parties so that they may address more effectively⁵¹⁷ the various aspects of the drug abuse problem having an international dimension.⁵¹⁸ In implementing and executing their obligations under the Convention States Parties shall take any necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their internal legal systems.⁵¹⁹

2. States Parties shall carry out their obligations under the present Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.⁵²⁰

3. A State Party to the present Convention shall not undertake in the territory of another State Party⁵²¹ ~~the independent exercise and performance of functions which are reserved for the authorities~~⁵²² the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities⁵²³ of that other State Party by its national law and regulations.⁵²⁴

The amended language shaded above does not appear to make any substantive changes, other than to state expressly the purpose of the Convention, when the earlier draft had implied it.

The amended U.S. proposal underwent slight, subsequent amendments and then became Article 2 of the Convention:

515. *Id.* at 171.

516. *Id.*

517. *Id.* at 176.

518. *Id.* at 171.

519. *Id.* at 156.

520. *Id.* at 171.

521. *Id.*

522. *Id.*

523. *Id.* at 176.

524. *Id.* at 171 (amended language shaded, original language struck).

Article 2 - SCOPE OF THE CONVENTION

1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of⁵²⁵ ~~the drug abuse problem~~⁵²⁶ illicit traffic in narcotic drugs and psychotropic substances⁵²⁷ having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.⁵²⁸

2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.⁵²⁹

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its⁵³⁰ ~~national laws and regulations~~⁵³¹ domestic law⁵³²

525. U.N. Drug Trafficking Convention, *supra* note 6.

526. 2 *Official Records*, *supra* note 318, at 171.

527. U.N. Drug Trafficking Convention, *supra* note 6.

528. *Id.*

529. *Id.*

530. *Id.*

531. 2 *Official Records*, *supra* note 318, at 171.

532. U.N. Drug Trafficking Convention, *supra* note 6 (amended language shaded, previous draft's language struck).