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THE "SELF-EXECUTING" CHARACTER OF THE REFUGEE PROTOCOL'S *NONREFOULEMENT* OBLIGATION

CARLOS MANUEL VÁZQUEZ*

When the United States ratified the 1967 U.N. Protocol Relating to the Status of Refugees¹ (Protocol), it undertook not to "expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on specified grounds.² On May 24, 1992, President Bush issued an executive order, known as the Kennebunkport Order, authorizing the United States Coast Guard to interdict vessels on the high seas suspected of containing Haitians destined for U.S. shores and to return such persons to Haiti without regard to whether their lives or freedom would be threatened on the grounds specified in the Protocol.³ The Coast Guard thereupon began intercepting such vessels and returning their passengers to Haiti without inquiring whether they would be persecuted there.

* Associate Professor of Law, Georgetown University Law Center. J.D., Columbia; B.A., Yale. I have addressed the issues that are the subject of this article in *amicus curiae* briefs filed over the years in various cases. See Brief of Amicus Curiae, The Lawyers Committee for Human Rights, *McNary v. Haitian Ctrs. Council*, No. 92-344; Brief of Amicus Curiae, The Lawyers Committee for Human Rights, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); Brief of Amici Curiae, The Lawyers Committee for Human Rights, American Immigration Law Foundation, and Center for Human Rights and Constitutional Law, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992); Reply Brief of Amicus Curiae, The International Human Rights Law Group, *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987); Brief of Amicus Curiae, The International Human Rights Law Group, *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987). I benefited enormously from discussions with co-counsel in those cases, particularly Roberts B. Owen, O. Thomas Johnson, Jr., Arthur Helton, and Andrew I. Schoenholtz.

1. Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

2. U.N. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Article 33]. Under Article I(1) of the 1967 Protocol, the United States has agreed to apply Articles 2 to 34 inclusive of the Convention. The United States had not become party to the Convention itself because the Convention was primarily designed to address the post-war refugee problem in Europe. See S. REP. NO. 14, 90th Cong., 2d Sess. 6, 9 (1968) (statement of Lawrence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State).

3. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992). The order provides that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." *Id.* at § 2(c)(3). The order does not, however, prohibit the return of such refugees, unlike the 1981 Reagan executive order which was superseded by the Kennebunkport Order and which specifically provided that no refugee was to be returned without his consent. Exec. Order No. 12,324, §§ 2(c)(1) and (3), 46 Fed. Reg. 48,109 (1981). According to the government, the Kennebunkport Order "embodied" President Bush's conclusion "that all interdictees should be repatriated directly to Haiti." Brief for Petitioners at 7, *McNary v. Haitian Ctrs. Council*, *cert. granted*, 113 S. Ct. 52 (No. 92-344).

When this policy was challenged in *Haitian Centers Council v. McNary*,⁴ the Bush Administration responded in two ways to the argument that the policy violates the United States' obligations under the Protocol. First, the government took the position that the policy does not in fact violate the Protocol. It argued that the Protocol prohibits the United States from returning refugees to their persecutors if the refugee is present within our territory, but does not prohibit us from reaching out beyond our territorial waters to intercept refugees on the high seas to turn them over to their persecutors.⁵ Second, the government argued that, even if the Protocol's *nonrefoulement* obligation does apply to refugees on the high seas, the treaty cannot be enforced by the courts of this country because it is not "self-executing."⁶ Unlike the first argument, the second does not attempt to defend the policy's legality. Instead, it denies the Protocol's judicial enforceability. This Article examines the government's second argument.⁷

The Haitian interdiction policy was challenged in *McNary* not only as a violation of the Protocol, but also as a violation of the Refugee Act of 1980, which, like the Protocol, prohibits the "return" of any refugee to a place where he would be persecuted.⁸ The district court in *McNary* held that the Refugee Act did not apply to refugees on the high seas.⁹ It then considered whether the policy violated the Protocol. The court affirmed that Article 33 "imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution."¹⁰ The court nevertheless denied

4. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992)(No. 92-344).

5. Defendants' Opposition to the Entry of Injunctive Relief at 19-24, *Haitian Ctrs. Council v. McNary*, No. 92 Civ. 1258 (E.D.N.Y. June 9, 1992), *rev'd*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); Brief for Appellees at 37-51, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.)(No. 92-6144), *cert. granted*, 113 S. Ct. 52 (1992)(No. 92-344). Brief for Petitioners at 36-51, *McNary v. Haitian Ctrs. Council*, *cert. granted*, 113 S. Ct. 52 (No. 92-344).

6. Brief for Defendants, *Haitian Ctrs. Council v. McNary*, No. 92 Civ. 1258 (E.D.N.Y. June 9, 1992), *rev'd*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); Brief for Appellees, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.)(No. 92-6144), *cert. granted*, 113 S. Ct. 52 (1992)(No. 92-344).

7. Candidate Clinton described the Bush Administration policy of returning Haitians to Haiti without a hearing "brutal" and concluded that the Second Circuit was "right" when it held that the policy was illegal. *Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, U.S. Newswire, July 29, 1992, available in LEXIS, Nexis Library, Wires File. President-elect Clinton reaffirmed that his position "has been pretty clear all along": "I think we should have a process in which these Haitians get a chance to make their case. I think that the blanket sending them back to Haiti under the circumstances which have prevailed for the last year was an error and so I will modify that process." *Excerpts From President-Elect's News Conference in Arkansas*, N.Y. TIMES, Nov. 13, 1992, at A18. President Clinton, however, decided to continue the Bush policy at least temporarily.

8. 8 U.S.C. § 1253(h) (1988).

9. *Haitian Ctrs. Council v. McNary*, No. 92-Civ. 1258, slip op. at 8 (E.D.N.Y. June 9, 1992), *rev'd*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992).

10. *McNary*, No. 92 Civ. 1258, slip op. at 6. This conclusion is in accord with the plain text of Article 33 and with the decisions of the Supreme Court. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (The Convention "imposed a mandatory duty on contracting States not to return

the requested relief because it believed that it was constrained by the Second Circuit's decision in *Bertrand v. Sava*,¹¹ which the court read as holding that "the Protocol's provisions are not self-executing."¹² The court recognized that this ruling rendered Article 33 "a cruel hoax . . . not worth the paper it is printed on,"¹³ and it invited the Second Circuit to reconsider its decision in *Bertrand*. The Second Circuit had no occasion to consider the self-execution issue, however, as it held that the Refugee Act does prohibit the government from intercepting refugees on the high seas and returning them to their persecutors.¹⁴ The Supreme Court has granted certiorari.¹⁵

If the Supreme Court affirms the Second Circuit's statutory holding, it will be unnecessary for it to consider whether Article 33 imposes the same prohibition and is self-executing. The self-executing character of Article 33 also need not be addressed if the Supreme Court accepts the government's argument that Article 33's *nonrefoulement* obligation does not apply with respect to refugees who have not yet reached our shores.¹⁶ Because the self-execution issue arises only if Article 33 applies to refugees on the high seas but the Refugee Act does not, this Article proceeds from those assumptions.

I. BACKGROUND: THE "CONFOUNDING" DOCTRINE OF SELF-EXECUTING TREATIES

That Article 33 is enforceable in United States courts appears to follow from the plain language of the Constitution and of Article 33 itself. Article VI, clause 2 of the Constitution, the Supremacy Clause, declares that all treaties made under the authority of the United States are the "supreme Law of the Land" and instructs the courts to give them effect. The Protocol is a treaty of the United States. Article 33 sets forth in unambiguous terms the obligation not to return refugees to their persecutors. These two provisions appear on their face to require the courts to enforce the *nonrefoulement* obligation in cases properly before them.¹⁷

an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons.") (footnote omitted); *INS v. Stevic*, 467 U.S. 407, 429 n.22 (1984) ("Article 33 gave the refugee an entitlement to avoid deportation to a country in which his life or freedom would be threatened.").

11. 684 F.2d 204 (2d Cir. 1982).

12. *McNary*, No. 92 Civ. 1258, slip op. at 7.

13. *Id.*

14. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350, 1357-66 (2d Cir.), cert. granted, 113 S. Ct. 52 (1992) (No. 92-344).

15. 113 S. Ct. 52 (1992) (No. 92-344).

16. On this issue, see Andrew I. Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 GEO. IMMIGR. L.J. 67 (1993).

17. Whether the case is properly before the court may, of course, turn on such matters as whether the court has been given jurisdiction over the subject matter and whether the plaintiffs

Notwithstanding these provisions, the government argued in *McNary* that Article 33 is unenforceable in the courts because the article is not self-executing. The lower courts have long considered the doctrine of self-executing treaties to be "one of the most confounding doctrines in treaty law."¹⁸ The courts and commentators appear to agree that a non-self-executing treaty is one that must be "implemented" by legislation before it may be applied by the courts. There is no consensus, however, on just why legislation is necessary—that is, on just what it is that a non-self-executing treaty fails to accomplish *ex proprio vigore*. Courts have, at various times, addressed the "self-execution" question as if it concerned (a) whether the treaty itself has the force of domestic law (or instead requires legislation to give it such force); (b) whether the treaty itself imposes on the defendant the obligation the plaintiff is seeking to enforce (or instead contemplates that the obligation will be imposed in the future through domestic legislation); (c) whether the obligation the treaty imposes is spelled out clearly enough in the treaty itself to be amenable to judicial enforcement (or must instead be fleshed out by Congress before it may be enforced by the courts); and (d) whether the treaty itself confers a private right of action (or must instead be supplemented by legislation before it may be enforced in a private suit).

The label "self-executing" can properly be used to describe a treaty that, of its own force, has any of the foregoing effects. As applied to statutory and constitutional provisions, it is understood that the term does not describe a fixed legal attribute of a law, but instead denotes that the provision accomplishes some legal end itself.¹⁹ The meaning of the statement that a particular law is or is not "self-executing" turns entirely on what the end is that the speaker has in mind. When the term is used to describe a constitutional or statutory provision, the speaker will usually specify the respect in which the provision is or is not self-executing. With respect to treaties, however, the term has pro-

have a right of action. These questions do not concern the enforceability *vel non* of the obligation, however. If a particular court does not have jurisdiction, the obligation may be enforceable in another court. And even if a particular plaintiff does not have a right of action, the obligation may be enforceable by someone who does have a right of action or by a litigant invoking the obligation defensively. The government did not argue in *McNary* that the federal court lacked jurisdiction over the subject matter under 28 U.S.C. § 1331. The government did argue that the plaintiffs lacked a right of action. The plaintiffs argued in turn that their right of action was conferred by the Administrative Procedure Act (APA). On this question, *see infra* section V.

18. *See* *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992).

19. Thus, the dormant commerce clause is sometimes described as self-executing because it itself preempts state regulation, *see, e.g.*, *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986), and the takings clause has been described as self-executing because it itself confers a remedy for its violation, *see, e.g.*, *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 305 (1987). *See generally* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1120-21 (1992).

duced confusion because it has mistakenly been thought to be a term of art that describes a distinct attribute that a treaty must possess before it may be applied by the courts. In reality, the term has been used by the courts (albeit not self-consciously) to describe as wide a variety of attributes of treaty provisions as of statutory and constitutional provisions.²⁰

The government in *McNary* attempted to perpetuate and exploit the lower courts' confusion by appearing to maintain that the self-execution issue concerns a distinct attribute of treaties, while manifesting in different parts of its submissions different understandings of just what it is that the "doctrine" addresses.²¹ But its submissions also ultimately recognized what commentators have been saying for some time: that the terms "self-executing" and "non-self-executing" do not describe a fixed legal attribute of treaties and analytically are virtually useless and potentially very confusing.²² The government argued that, when the Board of Immigration Appeals (BIA) described the Protocol as self-executing in *In re Dunar*,²³ it meant only that the Protocol of its own force established an obligation to enact legislation prohibiting the return of refugees to a place where they would be persecuted.²⁴ Although this is perhaps the least likely sense in which a court would use

20. Failure to recognize the diversity of concepts to which the "self-executing" label may refer produces confusion, for example, when one court holds that a treaty is not self-executing because it does not itself confer a cause of action and a later court applies that precedent to dismiss a treaty claim in a case in which the litigant does not rely on the treaty as the source of his cause of action. This is the mistake the government asked the court to make in *McNary* when, relying on *Tel-Oren v. Libya*, 726 F.2d 774 (D.C. Cir. 1984), it asked the court to dismiss on the ground that the Protocol does not itself confer a cause of action and is therefore not self-executing. In *Tel-Oren*, plaintiff relied on a treaty in a suit for damages, and, because a damages remedy was conferred by no other law, the court quite properly considered whether the treaty itself conferred a cause of action for damages. It concluded that the treaty did not, and it described the treaty as not self-executing for that reason. The respondents in *McNary*, however, do not rely on the Protocol as the basis of their cause of action. They rely on the APA. If the APA confers a cause of action, it is irrelevant whether the treaty itself confers one. See *infra* Section V.

21. For example, in the very same sentence, the government suggested to the district court in *McNary* that Article 33 is not self-executing because it is not itself effective as domestic law and because it does not confer a cause of action. See Defendants' Opposition to the Entry of Injunctive Relief at 26, *Haitian Ctrs. Council v. McNary*, No. 92 Civ. 1258 (E.D.N.Y. June 9, 1992) ("There is no indication that the United States intended by its acceptance of the Protocol to incorporate Article 33 into domestic law as a private cause of action."). As discussed below, these are distinct issues.

22. See Vázquez, *supra* note 19, at 1082, 1120-21; Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2383 (1991); Myres McDougal, *Remarks*, 45 PROC. AM. SOC'Y INT'L L. 102 (1951) [hereinafter *Remarks*]; Myres McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 SAN DIEGO L. REV. 25, 77 (1959) ("The words self-executing and non-self-executing embrace neither intrinsic nor historic meaning nor magic to resolve the issue."); Jordan Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 783 & n.132 (1988).

23. 14 I. & N. Dec. 310 (1973).

24. See Defendants' Opposition to the Entry of Injunctive Relief at 29, *Haitian Ctrs. Council v. McNary*, No. 92 Civ. 1258 (E.D.N.Y. June 9, 1992); *rev'd*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992). Brief for the Appellants at 28, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991)(No. 91-6060), *cert. denied*, 112 S. Ct. 1245 (1992).

the term,²⁵ it is true that, as a matter of standard English usage, the term may be understood in that sense. In attempting to explain away the BIA's statement in *In re Dunar*, the government thus demonstrated that the term "[is] essentially meaningless, and . . . the quicker we drop it from our vocabulary the better for clarity and understanding."²⁶

The government's discussion of *In re Dunar* shows that, in the government's view, a treaty may be unenforceable in domestic courts even if it is "self-executing" in certain respects. The gist of its discussion of *In re Dunar* is that, while Article 33 may be self-executing in some respects, it is not self-executing in the relevant respect. Unfortunately, the government is vague about what the relevant respect is. Different portions of its submissions in *McNary* seem to ascribe different deficiencies to Article 33. Cumulatively, however, they reveal that the government believes that Article 33 is non-self-executing in each of the four respects listed above. Below, I address in turn each of the deficiencies that the government appears to ascribe to Article 33. I show that Article 33 is the law of the land, that Article 33 itself imposes an obligation on the government not to deliver refugees into the hands of their persecutors, and that this obligation is perfectly susceptible to judicial enforcement. Additionally, I show that a treaty may be enforceable in the courts even if it does not itself confer a private right of action.

II. THE PROTOCOL IS THE SUPREME LAW OF THE LAND

The Supremacy Clause declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."²⁷ The Protocol is a treaty, valid and in force, made under the authority of the United States. It follows that the Protocol is the supreme law of the land, and thus has the force of domestic, as well as international, law.

Despite the clarity and force of the foregoing syllogism, the government has argued that the Protocol does not have domestic legal force.²⁸

25. The government's construction results in perhaps the *greatest* attenuation between the treaty provision and its ultimate object. The connection could be more attenuated only if the treaty delegated to another body the obligation to require the United States to enact legislation that would prohibit the return of refugees to a country in which they would be persecuted.

26. *Remarks*, *supra* note 22, at 102. Just as the government dismisses *In re Dunar*, I attach little weight to lower court decisions that state in a conclusory way that the Protocol or Article 33 is not self-executing. *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989); *Haitian Refugee Ctr. v. Gracey*, 600 F. Supp. 1396 (D.C. Cir. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987). Because the judicial decisions addressing the self-executing character of Article 33 are unusually conclusory or ill-reasoned, I primarily address in this Article the arguments advanced by the government on this question during the *McNary* litigation and in an earlier case raising the issue, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992).

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

28. See Opposition Brief at 35, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d

This rather bold position is based on the notion that treaties that are not "self-executing" are not the law of the land.²⁹ Such treaties, according to the government, may impose international obligations on the United States, but those international obligations do not have the force of domestic law.³⁰ This notion has been combined by certain courts with the idea that a treaty's self-executing character is largely a matter of intent, to produce the conclusion that a treaty is the law of the land only if the United States treaty-makers intended that it be the law of the land.³¹ As applied to the Protocol, this analysis accepts that the Protocol might establish an international obligation not to deliver refugees to their persecutors, but it maintains that this obligation does not have the force of domestic law unless the President and/or the Senate so intended.

If the United States Constitution did not include the Supremacy Clause, all treaties would have the force of law internationally but not domestically. That is the rule in Great Britain today,³² and it was the rule there at the time of our independence. In that country, no treaty can be applied by domestic law-applying officials, such as judges. They must instead be executed by Parliament, whose laws are in turn en-

Cir.)(No. 92-6144), *cert. granted*, 113 S. Ct. 52 (1992)(No. 92-344) ("No evidence suggests that the United States intended by its acceptance of the Protocol to incorporate Article 33 into domestic law. . . ."); Defendant's Opposition to the Entry of Injunctive Relief at 26, *Haitian Ctrs. Council v. McNary*, No. 92 Civ. 1258 (E.D.N.Y. June 9, 1992) ("There is no indication that the United States intended by its acceptance of the Protocol to incorporate Article 33 into domestic law as a private cause of action."). See also Appellants Reply Brief at 8, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991)(No. 91-6060), *cert. denied*, 112 S. Ct. 1245 (1992)("[Treaties] may impose obligations under international law on the United States as a contracting party without themselves creating obligations under domestic law. . . ."). Defendants' Memorandum Opposing Injunctive Relief at 30, *Haitian Refugee Ctr. v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991)(No. 91-2653) ("[T]he statement and actions of the executive and Congress provide the best indication of whether Article 33 was intended to become part of domestic law directly, without implementing legislation."); *id.* at 32 ("Had Article 33 of the Protocol been viewed as self-executing, that provision itself would have been domestic law. . . .").

29. This idea finds its genesis in a negative inference from a statement in the Supreme Court's opinion in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) discussed *infra* notes 63-76 and accompanying text.

30. See Reply Brief for Appellants at 8, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991)(No. 91-6060), *cert. denied*, 112 S. Ct. 1245 (1992).

31. This was essentially the reasoning of the court in *United States v. Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1978), on which the government relied in *McNary* and in *Baker*. See Brief for Appellees at 35, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.)(No. 92-6144), *cert. granted*, 113 S. Ct. 52 (1992)(No. 92-344); Defendants' Opposition to the Entry of Injunctive Relief at 26, *Haitian Ctrs. Council v. McNary*, No. 92 Civ. 1258 (E.D.N.Y. June 9, 1992), *rev'd*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); Reply Brief for Appellants at 8, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991)(No. 91-6060), *cert. denied*, 112 S. Ct. 1245 (1992); Reply Brief for Appellants at 24-26, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991) (No. 91-6060), *cert. denied*, 112 S. Ct. 1245 (1992); Emergency Motion for Stay Pending Appeal at 19, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991)(No. 91-6060), *cert. denied*, 112 S. Ct. 1245 (1992); Defendants' Memorandum Opposing Injunctive Relief, at 29-30, 34, *Haitian Refugee Ctr. v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991)(No. 91-2653).

32. See O'Higgins & Dublin, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279, 301 (1960).

forced by domestic law-applying officials. This is so regardless of the treaty's terms. For example, even if a treaty purported itself to set a tariff at a given level, domestic law-applying officials would collect the tariff as set by prior statutes until Parliament executed the treaty by amending the earlier statute.³³

This, however, is the rule that the Framers of our Constitution rejected when they adopted the Supremacy Clause. By declaring treaties to be laws, the clause gives treaties domestic legal force and thus makes them directly enforceable by domestic law-applying officials (such as judges) without the need for execution by domestic law-making officials (i.e., Congress).

The government concedes that some treaties may have the force of domestic law, and may thus be applied by the courts without legislative "execution." But it contends that treaties have domestic legal force only if the treaty-makers so intend. In the absence of such an intent, the treaty is not "self-executing," and the British rule prevails.³⁴ This position, however, cannot be squared with the text of the Supremacy Clause. The government in effect would interpret the Supremacy Clause as a *power-conferring* provision: the clause, as so interpreted, would give the treaty-makers the *power* to make treaties the law of the land. But that is not what the clause says. The Constitution gives the treaty-makers the power to make treaties, but the Supremacy Clause by its terms gives the treaties they make automatic domestic legal force. Moreover, the Supremacy Clause purports to give domestic legal force to "all" treaties of the United States. A power-conferring interpretation of the clause is incompatible with the clause's statement that "all" such treaties "shall be" the law of the land.

The power-conferring interpretation of the clause is also unsupported by the available evidence of the Framers' intent in adopting the Supremacy Clause. The Supremacy Clause was the mechanism adopted by the Framers to secure compliance by the United States with its treaty obligations.³⁵ Before the adoption of the Constitution, state officials (including judges) were adhering to the British rule. They acknowledged that the United States had an international obligation to comply with its treaties, but they understood their duty as law-applying officials to be to enforce the existing state laws, even if they conflicted with treaty obligations, until those laws were modified or amended by the state legislatures.³⁶ The lack of a mechanism for deterring or cor-

33. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 274-75 (1795) (Iredell, Circuit Justice). Justice Iredell's judgment on Circuit was reversed by the Court because he had interpreted the treaty too narrowly.

34. See *supra* note 28.

35. See generally Vázquez, *supra* note 19, at 1102.

36. See *Ware v. Hylton*, 3 U.S. (3 Dall.) at 277.

recting violations of treaties by government officials was among the deficiencies of the Articles of Confederation that most concerned the Framers.³⁷

There was a consensus at the Convention that the new Constitution should include an effective mechanism for correcting treaty violations. Two principal schemes were considered. Under the Virginia plan, Congress was to have the power to "negative" state laws that conflicted with the nation's treaty obligations.³⁸ Under this plan, treaties would not themselves have superseded pre-existing domestic laws once ratified. The Virginia plan instead addressed the treaty-violation problem by giving the federal legislature the power to repeal state laws that conflicted with treaty obligations. This scheme would have retained the British rule, but instead of relying on the state legislatures to repeal conflicting state laws, it would have given that responsibility to the federal legislature.

This scheme was ultimately rejected in favor of the New Jersey plan's scheme. Under the latter plan, treaties themselves were given the force of law through the Supremacy Clause.³⁹ The treaties themselves were declared to be laws, and thus themselves operated to amend or repeal inconsistent laws without action by the legislatures of either the state or federal governments. The state courts were specifically instructed to give effect to treaties as law, and the federal courts were given jurisdiction over cases "arising under" treaties to ensure that the state courts complied with this directive. The scheme that was adopted thus gave the courts, rather than the legislatures, the first-line responsibility of enforcing the nation's treaties insofar as they related to individuals.⁴⁰

This scheme was not uncontroversial. There were objections to giving treaties the force of law but excluding from the treaty-making process

37. Vázquez, *supra* note 19, at 1102.

38. See *id.* at 1104-06.

39. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 27-29 (rev. ed. 1966).

40. The Supreme Court in a recent decision observed that the New Jersey plan differed from the Virginia plan in that the latter contemplated that Congress's legislation would operate directly on individuals, whereas the former contemplated that Congress's legislation would operate on the states, which would then have been responsible for executing Congress's directives through legislation. *New York v. United States*, 112 S. Ct. 2408, 2421-23 (1992). According to the Court, the Framers rejected the New Jersey plan in this regard in favor of the Virginia plan. Under the Court's analysis in *New York v. United States*, the operation of federal statutes under the New Jersey plan would have resembled the operation of treaties under the British rule: neither would have operated on individuals; both would have required legislative implementation. The accuracy of the Court's description of the New Jersey plan in this regard may be debated. See 1 FARRAND, *supra* note 39, at 251, where Patterson, who proposed the New Jersey plan, noted that his plan, like the Virginia plan, authorizes Congress to legislate directly over individuals. In any event, with respect to treaties, it is clear that it was the New Jersey plan, through the Supremacy Clause, that contemplated direct application to individuals, while the Virginia plan, as originally proposed, contemplated that treaties would not themselves operate as law upon individuals but instead would require legislative implementation. See Vázquez, *supra* note 19, at 1104-06.

the most representative house of the federal legislature. Gouverneur Morris noted this anomaly and proposed correcting it by giving the House a role in the making of treaties.⁴¹ Madison responded that it would be inconvenient to give such a role to as numerous a body as the House, as secrecy and dispatch were indispensable in treaty-making.⁴² Morris responded that he was not disposed to make treaty-making too easy: the greater the difficulty of making treaties, Morris stated, the more seriously they will be taken.⁴³ Thus, the proposal for addressing this anomaly—*i.e.*, that treaties were laws not made by the legislature—was defended on the ground that it would advance the Supremacy Clause's purpose of maximizing treaty compliance.⁴⁴ No one suggested correcting the anomaly by adopting the British rule, which would have permitted one body to make treaties but another to give them domestic legal force. Such a rule would have compromised the Supremacy Clause's purpose of maximizing treaty compliance by increasing the likelihood that treaties would bind us internationally but not be judicially enforceable domestically. This is, of course, what the power-conferring interpretation of the Supremacy Clause would accomplish.

There were also proposals to carve out categories of treaties that could be made only with the House's involvement. Madison proposed giving the House a role in the making of "[t]reaties eventual or of alliance."⁴⁵ Additionally, there were proposals for requiring the concurrence of less than two-thirds of the Senate for the making of certain categories of treaties.⁴⁶ Ultimately, all proposals that would have drawn distinctions among treaties were rejected. The Supremacy Clause's reference to "all" treaties thus cannot be said to have been inadvertent.

In short, the available evidence of the Framers' intent fails to support the power-conferring version of the self-execution doctrine. Even though some Framers were troubled by the fact that treaties were laws not made by the legislature, no one proposed addressing this problem by retaining the British rule, which would have permitted the making of treaties that lacked domestic legal force pending legislative implementation. Instead, the Framers adopted a provision that automatically gave treaties domestic legal force. Moreover, all proposals for drawing distinctions among treaties were rejected. History thus undermines the power-conferring theory and fully supports the Supremacy Clause's plain text: "all" treaties, once ratified, are the "supreme Law of the

41. *Id.* at 392.

42. *Id.*

43. *Id.* at 393.

44. Ultimately, Morris's proposal was rejected, primarily because of the perceived need for secrecy in the negotiation of treaties. *Id.* at 394.

45. *Id.*

46. *Id.* at 540, 547-49.

Land."

The proponents of the power-conferring version of the self-execution doctrine do not rely on the Supremacy Clause's text or history. They rely instead on dicta from Supreme Court decisions seeming to suggest that treaties that are not self-executing are not the law of the land, along with language suggesting that whether or not a treaty is self-executing is a matter of intent. As discussed in the next section, however, the Supreme Court's cases do not support the radical departure from the Supremacy Clause's text that the power-conferring theory would work. Rather, they establish merely that a treaty must await congressional action before it may be enforced in court if the obligation the United States undertook in entering into the treaty was an obligation to accomplish certain ends through legislation. This version of the self-execution doctrine is far less problematic from a textual standpoint than is the power-conferring theory. It does not produce the facial discrepancy between our international obligations and our domestic law that the latter would produce; it merely recognizes that when the parties have committed themselves to accomplishing certain ends in the future through domestic law-making, the obligation is addressed to our domestic law-making institution, Congress. That is very different from accepting, as the government asked the court in *McNary* to do, that the United States when it ratified the Protocol undertook an immediately effective, clearly defined obligation not to return refugees to a place of persecution, but that the obligation lacks the force of domestic law, and thus may not be applied by domestic law-applying officials (such as judges), because the President and the Senate did not manifest an intention that it have the force of domestic law. The President and the Senate need not have formulated any intent on that issue. The Supremacy Clause itself, by its terms, makes the Protocol the "supreme Law of the Land." Indeed, the Supreme Court's most recent treaty decision, rejecting the earlier dicta upon which the proponents of the power-conferring theory rely, confirms that the "self-execution" question does not concern the treaty's status as "law of the land," and rejects the notion that a non-self-executing treaty lacks the force of domestic law.⁴⁷

There are, to be sure, circumstances in which a treaty that is valid and in force internationally does not have the force of domestic law, notwithstanding the Supremacy Clause. For example, if a treaty violates other provisions of the Constitution, or purports to do what is beyond the scope of the treaty-making power, it is not the law of the land

47. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2195 (1992) ("The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual. . . .").

for the same reason an unconstitutional statute is not the law of the land, even though the treaty may have force internationally.⁴⁸ In addition, if a subsequently enacted statute or a subsequently ratified treaty conflicts with an earlier treaty, the later statute or treaty supersedes the earlier treaty as law of the land, even though the earlier treaty might continue to bind us internationally.⁴⁹

It may well be that the President and Senate have the power to terminate a treaty's domestic legal force even without entering into a later treaty.⁵⁰ If so, it may well follow that the President and Senate have the power affirmatively to countermand the Supremacy Clause's ordinary effect with respect to a particular treaty at the time of the treaty's ratification.⁵¹ Recognizing this power, however, would do far less violence to the Supremacy Clause than acceptance of the power-conferring theory would. The Supremacy Clause would remain the rule, and it would take an affirmative act of the treaty-makers to reverse it with respect to a particular treaty. But to go further and accept the government's argument that a treaty lacks domestic legal force unless the treaty-makers have affirmatively demonstrated an intention to give it domestic legal force would require such a radical departure from the clause's terms that the interpretation must be rejected, if only on textual grounds.

It is unnecessary to consider here whether the treaty-makers have the power to deprive a treaty of its domestic legal force by affirmative act at the time of ratification, such as by expressing an intention that the treaty not have domestic legal force. There is no evidence that the treaty-makers entertained any such intent with respect to Article 33. Indeed, the statements that the government cited in *McNary* to show such an intent establish the opposite.

The government recognized in *McNary* that Article 33 prohibited the United States from doing certain things that the Attorney General had discretion to do under then-existing statutes.⁵² As the Supreme

48. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 137-156 (1972).

49. See *Whitney v. Robertson*, 124 U.S. 190, 195 (1888); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870).

50. Cf. *Goldwater v. Carter*, 444 U.S. 996, 1006-07 (1974) (Brennan, J., dissenting).

51. The President and Senate purported to do this when they attached to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the U.N. Dec. 10, 1984, Hein's No. Kav 2398, a declaration to the effect that the treaty was not "self-executing," by which they meant that the treaty lacked domestic legal force. S. REP. NO. 30, Report of the Senate Committee on Foreign Relations on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong., 2d Sess. 12 (1990). On the validity of such a declaration, compare Stefan A. Riesenfeld and Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHICAGO-KENT L. REV. 571 (1991), and Note, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233 (1979), with Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Power Reservation*, 56 COLUM. L. REV. 1151 (1956).

52. See Brief for Appellees at 33-34 n.20., *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.) (No. 92-6144), cert. granted, 113 S. Ct. 52 (1992) (No. 92-344).

Court observed in *Stevic*, "the most significant difference" between Article 33 and the text of existing immigration laws was that the former "gave the refugee an entitlement to avoid deportation to a country in which his life or freedom would be threatened," whereas the latter "merely provided the Attorney General with the discretion to grant withholding of deportation on grounds of persecution."⁵³ As the Supreme Court observed in *Stevic*, despite the acknowledged difference between Article 33 and the statutory text, it was understood at the time of our accession that "no amendment of the existing statutory language was necessary" because it was contemplated that the Attorney General would thenceforth "implement" and "honor the requirements of" Article 33 without legislative action.⁵⁴ This, of course, is fully consistent with the conclusion that Article 33 was itself effective as domestic law. It was unnecessary to amend the statute giving the Attorney General discretion to turn refugees over to their persecutors because Article 33 itself, as law of the land, limited the Attorney General's discretion. If, as the Supreme Court said in *Stevic*, Article 33 gave refugees a "right" and "entitlement" not to be delivered by the United States to their persecutors, and existing domestic law did not give them that right or entitlement, and if, as the government argued in *McNary*, Article 33 did not have the force of domestic law, then amendment of existing statutes *would have been required*. In light of the acknowledged differences between the treaty and the statute, the statement that no amendment of the statute was required must have been a recognition that Article 33 itself had domestic legal force and superseded the inconsistent provisions of the immigration law. To reach any other conclusion would be to accuse our treaty-makers of having no intention to grant to refugees the "right" and "entitlement" that Article 33 required us to provide them. The Court should be slow to attribute such bad faith to our treaty-makers.⁵⁵

The government in *McNary* relied on the Supreme Court's statement in *Stevic* that, notwithstanding the difference between the dictates of Article 33 and the language of existing statutes, "the Attorney General could naturally accommodate the Protocol simply by exercising his dis-

53. 467 U.S. at 428-29 n.22.

54. *Id.* at 429-30.

55. *Cf.* *Chew Heong v. United States*, 112 U.S. 536, 540 (1884):

Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

Id.

cretion to grant such relief in each case in which the required showing was made, *and hence no amendment of the existing statutory language was necessary.*"⁵⁶ According to the government, "[t]his passage clearly indicates that if the Attorney General had been unable to accommodate the Protocol under the INA's provisions as then written, an 'amendment' of those provisions would have been 'necessary' for aliens to obtain relief."⁵⁷ This, however, reads far too much into the Supreme Court's footnote.⁵⁸ To be sure, Article 33, as law of the land, would have superseded any existing statute that required the Attorney General to deliver refugees to their persecutors. No amendment of such a statute would have been "necessary" to enable the Attorney General to disregard the statute. Nevertheless, an amendment may have been considered "necessary" to eliminate the confusion that might have been generated by a facial discrepancy between the law as written and the Protocol.

Indeed, Congress subsequently did amend the immigration statutes to make it clear that the Attorney General did not have the discretion to deliver refugees to their persecutors. As the House Judiciary Committee Report states, and as the Supreme Court made clear in *Stevic*, this change was made "*for the sake of clarity.*"⁵⁹ These statements show that the President and Senate understood that Article 33 itself had domestic legal force. The amendment to the statute, which removed the discretion that the statute appeared to give the Attorney General, could have "clarified" existing law only if Article 33 itself served to limit the discretion that the Attorney General enjoyed before accession to the Protocol.⁶⁰ Article 33 could have had this effect only if

56. Brief for Appellees at 33-34 n.20, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.)(No. 92-6144), *cert. granted*, 113 S. Ct. 52 (1992) (No. 92-344) (quoting *Stevic*, 467 U.S. at 429 n.22) (emphasis added).

57. *Id.* at 34 n.20.

58. The government's argument that the Ninth Circuit followed this tortured line of reasoning in *Aguilar* when it relied on *Stevic* for the proposition that Article 33 was not self-executing is unconvincing. *United States v. Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991). Citing footnote 22 of *Stevic*, the Ninth Circuit said in *Aguilar* that "the Protocol" was not self-executing. It did not refer to any particular provision. The court was apparently relying on the Supreme Court's statement in footnote 22 of *Stevic* that Article 34 is "precatory and not self-executing." The Ninth Circuit thus made a common error: it assumed that if one provision of a treaty is not self-executing, none is. The settled rule, however, is that one provision of a treaty may be self-executing while others are not. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

59. *INS v. Stevic*, 467 U.S. 407, 429 (1984); H.R. REP. NO. 608, 96th Cong., 1st Sess. 17-18 (1979)(emphasis added). See also Brief for Appellees at 36, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.)(No. 92-6144), *cert. granted*, 113 S. Ct. 52 (1992)(No. 92-344) (noting that Congress "clarified[]" the statute when it amended it in 1980).

60. For this reason, the government's statement that "Congress's subsequent efforts in 1980 to clarify 8 U.S.C. § 1182(h) to conform its language to that of the Protocol . . . is irreconcilable with the notion that the Protocol had independent domestic force" is baffling. Brief for Appellees at 36, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.)(No. 92-6144), *cert. granted*, 113 S. Ct. 52 (1992)(No. 92-344). The amendment could have "clarified" existing law only if the Attorney General's discretion had been limited before then. The Supreme Court's statement that

it had the force of domestic law.⁶¹

In sum, Article 33 is the law of the land by virtue of the Supremacy Clause. There is no requirement that the President and Senate "intend" that a treaty be the law of the land: the Supremacy Clause dispenses with the need for any such intent. The power-conferring interpretation of the Supremacy Clause is incompatible with the clause's text and unsupported by either history or case law. It is unnecessary to consider whether the President and the Senate have the power affirmatively to countermand the Supremacy Clause with respect to a particular treaty upon ratification, for there is no evidence that the President and the Senate intended to do any such thing upon acceding to the Protocol. The Supreme Court in *Stevic* examined the statements on which the government relied in *McNary* and concluded that the Protocol had the effect of limiting the discretion that executive officials previously enjoyed to deliver refugees to their persecutors. If the Refugee Act is indeed territorially limited in its scope, as the government argues, and if Article 33 is not so limited, as the district court in *McNary* found, then Article 33, as "supreme Law of the Land," itself limits the government's discretion to deliver refugees to their persecutors.

III. ARTICLE 33 DOES NOT REQUIRE IMPLEMENTING LEGISLATION

Although the Supreme Court recognized early on that the Supremacy Clause dispensed with the need for legislative action to give treaties domestic legal force,⁶² it also recognized that certain treaties may nevertheless not be applied by the courts before implementing legislation has been enacted. Such treaties have become known as "non-self-executing" treaties. The distinction between self-executing and non-self-executing treaties has its source in the Supreme Court's deci-

the amendment was made "for the sake of clarity" thus establishes that Article 33 itself limited the Attorney General's discretion.

61. The government in *McNary* also relied on statements to the effect that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." S. Exec. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson), cited in Brief for Appellees at 36 n.21, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.) (No. 92-6144), cert. granted, 113 S. Ct. 52 (1992) (No. 92-344). See also S. Exec. K, 90th Cong., 2d Sess. VII, VIII (report of Secretary of State Rusk); S. REP. No. 14, 90th Cong., 2d Sess. 4 (1968); *id.* at 2 (Sen. Comm. report); 114 CONG. REC. 29,391 (1968) (statement of Sen. Mansfield). That is merely a statement that it was not then established practice to intercept refugees on the high seas and return them to the persecuting nation. The statements to the effect that "refugees in the United States have long enjoyed the protection and the rights which the Protocol calls for," S. REP. No. 14, 90th Cong., 2d Sess. 4 (1968) (testimony of State Department official) quoted in Brief for Appellees at 36 n.21, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.) (No. 92-6144), cert. granted, 113 S. Ct. 52 (1992) (No. 92-344) mean only that "the President and the Senate believed that the Protocol was largely consistent with existing law." *Stevic*, 467 U.S. at 417. They do not support the conclusion that, to the extent of any differences, the President and Senate intended that the Protocol not have domestic legal force. The statements discussed in the text establish the contrary.

62. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1795).

sion in *Foster v. Neilson*,⁶³ the only case in which the Supreme Court has denied relief to an individual on the ground that the treaty on which he relied was not self-executing.⁶⁴ Although the government would interpret *Foster* as a virtual resuscitation of the British rule, Chief Justice Marshall's opinion shows that the category of "non-self-executing" treaty he recognized is quite limited in scope and does not embrace Article 33. The Supreme Court did not deny that all treaties were the law of the land; it merely recognized that, if the obligation established by the treaty is an obligation to accomplish certain ends through legislation, the obligation must be performed by Congress. In other words, the Supreme Court held that the rule that legislation is not required is one that may be reversed by affirmative agreement of the parties to the treaty.

Marshall began the relevant portion of the *Foster* opinion by describing the domestic effect of treaties in countries that do not have a Supremacy Clause:

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.⁶⁵

The government in *McNary* cited lower court decisions that, in its view, read this language as establishing "a general presumption" that treaties may not be enforced in court by individuals.⁶⁶ In reality, this language merely restates the British rule. In the sentences that immediately follow in *Foster*, the Supreme Court made it clear that this rule was *rejected* by the Framers when they adopted the Supremacy Clause, which establishes the *opposite* rule in our country:

In the United States, a different principle is established. Our con-

63. 27 U.S. (2 Pet.) 253 (1829).

64. With the possible exception of the cryptic discussion in *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 50 (1913).

65. 27 U.S. (2 Pet.) at 314.

66. See, e.g., Defendants' Memorandum Opposing Injunctive Relief 28, *Haitian Refugee Ctr. v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991)(No. 91-2653); Brief for Appellees 34-35, *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir.)(No. 92-6144) *cert. granted*, 113 S. Ct. 52 (1992)(No. 92-344), which cite *Hanoch Tel-Oren v. Libya*, 726 F.2d 774, 808 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *United States v. Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). I do not agree that these decisions say that there is any such presumption, but, to the extent they do, they are based on misreadings of *Foster* and *Head Money Cases* and are erroneous for the reasons set forth in the text. The other decision that the government cited to support its supposed general presumption, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989), cannot by any stretch be read to support any such presumption.

stitution 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.⁶⁷

Foster thus reaffirms that the Supremacy Clause rejects the British rule, gives all treaties the status of domestic law, and establishes as the general rule in this country that treaties *do not* require implementation by the legislature before they may be applied by the courts.

Marshall did say that a treaty is to be regarded by the courts of justice as the equivalent of an act of legislation only if it "operates of itself, without the aid of any legislative provision." This qualification is the source of the "confounding"⁶⁸ doctrine of self-executing treaties. To the extent the terms self-executing and non-self-executing can be said to be terms of art as applied to treaties, they refer to the distinction Marshall drew in *Foster*. But *Foster* does not stand for the proposition that a treaty that does not operate of itself is not the law of the land. If a negative inference is to be drawn from Marshall's statement, the emphasis must be on the words "to be regarded in the courts of justice." Marshall's words must be understood as a statement that non-self-executing treaties, though the law of the land, nevertheless must be implemented by Congress because the obligation they impose is an obligation to accomplish certain ends through domestic legislation. *Foster* held that such an obligation is one that, in our constitutional system of separated powers, is for the legislature, not the courts, to perform.⁶⁹

Foster involved a treaty stipulating that certain "grants shall be ratified and confirmed to the persons in possession [of the lands.]"⁷⁰ In determining whether the provision "operate[d] of itself, without the aid of any legislative provision," Marshall framed the issue as follows: "Do these words act directly on the grants, so as to give validity to those not otherwise valid? or do they pledge the faith of the United States to pass acts which shall ratify and confirm [the grants]?"⁷¹ The issue was thus one of treaty interpretation, governed by the words of the provision, and the relevant question was whether those words "ratified and confirmed" the grants themselves or instead obligated the United States to "pass acts" to "ratify and confirm" the grants in the future. The Court read the "shall be ratified" language as contemplating a future act of ratification, but it said that its decision would have been different if the provision had said that the grants were "hereby" rati-

67. *Foster*, 27 U.S. (2 Pet.) at 314 (emphasis added).

68. *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.) cert. denied, 44 U.S. 832 (1979).

69. See *infra* note 75.

70. 27 U.S. (2 Pet.) at 315.

71. *Id.* at 314.

fied and confirmed.⁷²

That the issue was whether the treaty affirmatively contemplated a future act of ratification, and that this was a matter of treaty interpretation, were confirmed five years later in *United States v. Percheman*,⁷³ in which the Court reversed itself and held that the treaty involved in *Foster* was indeed self-executing. The Court's about-face on this point was the result of its review of the Spanish text, which provided that the grants "shall remain ratified and confirmed. . . ." These words, the Court held, denoted that the grants were ratified and confirmed "by force of the instrument itself"; the treaty did not, as the Court had previously concluded, "stipulat[e] for some future legislative act."⁷⁴

Foster and *Percheman* thus establish that, although treaties in the United States do not as a general matter require legislative implementation before they may be applied by the courts, this rule may be modified by the parties through the treaty itself.⁷⁵ The obligations the parties undertake in the treaty remain the law of the land, but if the obligation is one to accomplish certain ends in the future through legislation, then our courts may not treat the end as having been accomplished until the legislation is enacted.⁷⁶ The distinction recognized in these two cases was thus a distinction between a treaty that established an international obligation to "pass acts" accomplishing a certain end—a treaty that affirmatively "stipulates for some future legislative act"—and a treaty that purports of its own force to establish the obligation the plaintiff seeks to enforce. Article 33 would have fallen within Marshall's category of non-self-executing treaty if, instead of itself prohibiting the return of refugees, it had provided, in substance, that the contracting parties "shall enact laws prohibiting the return of refu-

72. *Id.*

73. 32 U.S. (7 Pet.) 51 (1833).

74. *Id.* at 88-89. It is noteworthy that the so-called doctrine of self-executing treaties, which has so confounded the courts, has been constructed around a decision that the Court quickly thereafter concluded was wrongly decided.

75. This conclusion was not as self-evident as Marshall made it out to be. Just as treaties in Great Britain require implementing legislation regardless of what the parties intended, the Court could have held in *Foster* that, in light of the Supremacy Clause, treaties in the United States do not require implementing legislation even if the parties intended to require it. In other words, it could have held that the rule that legislation is not required is not one that may be reversed by agreement. Underlying the Court's holding that legislation is required when the parties affirmatively so agree, therefore, is an unarticulated holding about our domestic separation of powers; the case was not disposed of, as Marshall seemed to suggest (and perhaps believe), by the parties' agreement. Nevertheless, after the Court's domestic separation-of-powers holding in *Foster*, it may be said that legislation is required if the parties intended to require legislation.

76. The test differs from the power-conferring theory discussed above in that (a) the default rule remains that no legislation is required, and (b) a stipulation of *the parties to the treaty*, not the unilateral intent of the United States treaty-makers, is necessary to reverse the rule. By focusing on what the parties agreed to (as opposed to what the United States treaty-makers unilaterally intended) the *Foster* rule is faithful to the Supremacy Clause, which conformed our international treaty obligations with our domestic law. The power-conferring theory, by contrast, would create a discrepancy between our international obligation and our domestic law.

gees to a place where they would be persecuted."

The decision on which the district court and the government relied in *McNary*, the Second Circuit's decision in *Bertrand v. Sava*,⁷⁷ apparently concluded that Article 33 established the latter obligation. Notwithstanding the provision's clear prohibitory language, the court concluded that Article 33 does not itself obligate the United States not to return refugees to a countries where they would be persecuted, but instead obligates the United States to "adjust" its domestic law to prohibit the return of refugees to such countries.⁷⁸ For this proposition, the court relied on its earlier decision in *Stevic v. Sava*.⁷⁹ What the Second Circuit had said in *Stevic*, however, was that, "[s]ince Article 33 of the Convention imposes an absolute obligation upon the United States, standards developed in an era of discretionary authority require some adjustment."⁸⁰ That does not suggest that the adjustment must be accomplished by legislation. As discussed above, it was clearly contemplated that, to the extent there was a discrepancy between what existing federal statutes required and what was required by the Protocol, United States officials would give effect to the Protocol's requirements as law within the framework of then-existing statutes—*i.e.*, without legislation. Executive and judicial officials were to adjust their standards without legislative action because the treaty itself so required. Indeed, the Supreme Court has made it clear that the obligation imposed by Article 33 is not an obligation to "pass acts" prohibiting the return of refugees to countries where they would be persecuted; rather, Article 33 itself, of its own force, "imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons."⁸¹ *Bertrand* accordingly did not survive the Supreme Court's decisions in *Stevic* and *Cardoza-Fonseca*.

Even if the issue had not already been resolved by the Supreme Court, the conclusion that Article 33 itself prohibits the return of refugees would be inescapable. The terms of Article 33 simply cannot be construed to require legislation. Furthermore, numerous statements of executive branch officials at the time of the Protocol's transmission to the Senate for its advice and consent show that Article 33 itself was understood to impose an immediate obligation on the United States not to deliver refugees to their persecutors, and to confer a correlative right upon refugees. In transmitting the Protocol to the Senate for its advice

77. 684 F.2d 204 (2d Cir. 1982).

78. *Id.* at 218.

79. 678 F.2d 401, 406 (2d Cir. 1982), *rev'd sub nom*, *INS v. Stevic*, 467 U.S. 407 (1983).

80. 467 U.S. at 406.

81. *Cardoza-Fonseca*, 480 U.S. at 429 (footnote omitted); *see also Stevic*, 467 U.S. at 429 n.22 (Article 33 gives refugees "right" and "entitlement.").

and consent, President Johnson described the Protocol as "a comprehensive Bill of Rights for refugees fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties."⁸² These and numerous other references in the legislative history to the "rights"⁸³ created by the Protocol plainly establish the understanding of the United States that the Protocol conferred substantive rights directly on refugees. President Johnson's statement explicitly recognizes that "[f]oremost among the humanitarian rights which the Protocol provides is the prohibition against expulsion or return of refugees to any country where they would face persecution."⁸⁴ This "foremost . . . right" guaranteed by the Protocol is precisely the "right" embodied in Article 33.⁸⁵ In light of these statements, it cannot be maintained that Article 33 "stipulated for some future legislative act."

The government argued in *McNary* that Article III of the Protocol is such a stipulation. Article III requires the contracting states to "communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol." This provision does not support the government's conclusion for two reasons. First, as the government acknowledged in *McNary*, in many countries treaties never have domestic legal force.⁸⁶ In such countries, treaties always require implementing legislation. Article III's reference to "laws [the contracting parties] may adopt" may thus simply be a reference to the laws adopted by states that require legislation in all circumstances. It does not suggest that the parties contemplated legislation by states that give treaties automatic domestic legal force. In fact, Article III's use of the permissive verb "may" indicates that the parties did not in fact intend affirmatively to *require* legislation, but meant merely to require that legislation enacted by countries whose domestic constitutions require implementing legislation be communicated to the Secretary General. Second, the Protocol incorporates

82. Message from the President of the United States transmitting the Protocol Relating to the Status of Refugees, S. Exec. K, 90th Cong., 2d Sess. III (1968) (emphasis added).

83. See Letter of Submittal of the Secretary of State Rusk to President Johnson regarding Protocol Relating to the Status of Refugees, S. Exec. K, 90th Cong., 2nd Sess. V (1968) ("[The Refugee Convention] constituted the most comprehensive *codification of the rights of refugees* so far attempted on an international level.") (emphasis added); S. REP. NO. 14, 90th Cong., 2d Sess. 4 (1968) (testimony of Lawrence A. Dawson, Acting Deputy Director, Officer of Refugee and Migration Affairs) ("The Protocol is a human *rights* document.") (emphasis added); *id.* at 6 ("[T]he Protocol deals entirely in the sphere of standards of protection and *rights for refugees*.") (emphasis added).

84. *Id.*

85. See also *INS v. Stevic*, 467 U.S. 407, 428-29 n.22 (1984) (Article 33 gave refugees a "right" and "entitlement" not to be returned to a country where they would be persecuted).

86. Defendants' Opposition to the Entry of Injunctive Relief at 26, Haitian Ctrs. Council v. McNary, No. 92 Civ. 1258 (E.D.N.Y. June 9, 1992), *rev'd*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992).

provisions that appear to contemplate legislation even in countries, such as the United States, in which treaties have automatic domestic legal force. Article 34, for example, was described by the Court in *Stevic* as "precatory and not self-executing."⁸⁷ Article III's reference to "laws [the contracting parties] may adopt" may thus also be a reference to laws giving effect to the provisions, such as Article 34, that leave the parties with discretion regarding the manner of achieving those provisions' aspirations. In light of these two possibilities, Article III simply does not support an inference that, despite Article 33's clear prohibitory language, the provision actually imposes an obligation to pass acts to prohibit the return of refugees to countries where they would be persecuted.

For the foregoing reasons, the district court decision in *Haitian Refugee Center, Inc. v. Gracey*,⁸⁸ relied on by the government in *McNary*, is simply wrong.⁸⁹ The *Postal* decision does not support the government's reliance on Article III. The provisions the *Postal* court was referring to provided that "[e]very State shall take the necessary legislative measures" to achieve certain ends.⁹⁰ They thus appeared to contemplate the enactment of legislation on the part of *every* party—whereas here the Protocol simply requires parties to inform the United Nations of the laws they "may" enact, thus acknowledging that legislation may not be required in some countries. Moreover, in *Postal* the quoted language appeared in each of the provisions to which the court referred, suggesting that each such provision was non-self-executing, whereas Article 33 is not accompanied by any such implementation rider.⁹¹ The court said in *Postal* that "[s]uch provisions are uniformly declared executory."⁹² It is obviously a very different matter to conclude that *a single provision* in a treaty requiring the parties to notify a depository of legislation they may enact renders *every provision* of the treaty executory.⁹³

87. 467 U.S. at 429 n.22.

88. 600 F. Supp. 1396 (D.C. Cir. 1985); *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

89. Judge Bork's solitary concurrence in *Tel-Oren* is similarly flawed.

90. 589 F.2d at 876 (footnote omitted; emphasis added).

91. Even the provision involved in *Postal* does not necessarily signify that the parties intended to require legislation. The court in *Postal* held that the provision was not self-executing because it contemplated the enactment of legislation. But the provision contemplates the enactment of legislation only if "necessary" to achieve the provision's ends. In light of the supremacy clause and *Foster*, legislation is not "necessary" in the United States unless the treaty affirmatively so stipulates. Because the provision involved in *Postal* does not tell us that legislation is necessary, its reference to "legislative measures" does not support a conclusion that the provision is not "self-executing."

92. 589 F.2d at 876-77 (emphasis added).

93. The *Gracey* court's paraphrase of *Postal* demonstrates its error. In holding that Article III of the Protocol rendered the entire Protocol non-self-executing, the *Gracey* court quoted *Postal* for the proposition that "treaties with '[s]uch provisions are uniformly declared executory.'" However, the words "treaties with" do not appear in *Postal*. The *Gracey* court thus fundamentally

In sum, the Supreme Court's prior decisions and the statements of the Executive upon transmitting the Protocol to the Senate for its advice and consent confirm what the plain text of Article 33 leaves no room to doubt: the provision itself imposes an immediately effective obligation not to deliver refugees into the hands of their persecutors. It does not impose an obligation to take steps in the future to prohibit the return of refugees to their persecutors. It is accordingly "self-executing" in the sense contemplated in *Foster* and *Percheman*. (Indeed, to conclude that Article 33 is not self-executing in the *Foster* sense would be to conclude that we have failed in the past twenty-five years to carry out our solemn obligation to enact legislation to confer a *nonrefoulement* right on refugees on the high seas (assuming, as we must for purposes of examining the self-executing issue, that Article 33 applies to such refugees while the Refugee Act does not).)

IV. ARTICLE 33 ESTABLISHES JUSTICIABLE OBLIGATIONS

Dicta in the Supreme Court's more recent decisions suggest that a treaty may have to be implemented by legislation before it may be enforced in court even if the parties did not specifically agree that legislation would be required. In *Stevic*, the Supreme Court said that Article 34 of the Convention was not self-executing because its language was "precatory."⁹⁴ In the *Head Money Cases*, the Supreme Court suggested that a treaty is not enforceable in court by individuals unless it "prescribe[s] a rule by which the rights of [individuals] may be determined".⁹⁵ These tests differ from that of *Foster* and *Percheman* in that they do not turn on an intent to require legislation. Instead, they reflect the view that certain rules are, under our system of separated powers, not for the courts to enforce.

Although the courts often describe a treaty that is not judicially enforceable on these grounds as "non-self-executing," these grounds of unenforceability are not unique to treaties. A statute that is "precatory" is similarly unenforceable in court—it does not impose a duty on the defendant.⁹⁶ A statute that does not prescribe a rule by which the

altered the statement it purported to be quoting.

94. 467 U.S. at 429 n.22 (holding that Article 34 of the Convention is "precatory and not self-executing").

95. 112 U.S. at 598-99. See also *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 99 (9th Cir. 1974); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). The government erroneously cited the *Head Money Cases* for the proposition that a treaty is enforceable in the courts by private parties only if the parties to the treaty intended that the rights established by the treaty be enforceable in court. This fundamentally misreads the Supreme Court's dictum, which establishes only that a treaty may not be enforced in court if the duty it imposes is not one that is amendable to judicial application. *Head Money Cases* does not even remotely say that the issue turns on the intent of the parties or of the U.S. treaty-makers concerning judicial enforceability.

96. Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981); see generally Vázquez, *supra* note 19, at 1124.

rights of the plaintiff may be determined is unenforceable in court because the duty it establishes is insufficiently determinate to be justiciable.⁹⁷ A treaty that shares these characteristics is unenforceable in court for the familiar reason that courts exist, solely, to enforce the rights of individuals.⁹⁸ If a treaty or a statute does not impose a "duty" on the defendant, either because it is precatory or because what it requires of the defendant is insufficiently spelled out, it does not give the plaintiff a correlative right.

Article 33 is clearly "self-executing" in this sense. As the Supreme Court has found, Article 33's *nonrefoulement* obligation is not precatory but "mandatory."⁹⁹ Nor can it be argued that the *nonrefoulement* obligation does not "prescribe a rule by which the rights of the private citizen or subject may be determined."¹⁰⁰ The unambiguous, prohibitory rule embodied in Article 33 is certainly amenable to judicial application without further expostulation by statute. The Supreme Court had no difficulty discerning the content of Article 33's *nonrefoulement* obligation in *Stevic*,¹⁰¹ and the government routinely enforces it with respect to refugees who have reached our shores.

The Supreme Court's discussion in *Stevic* of Articles 33 and 34 of the Convention illustrates the proper application of this test for determining whether a treaty provision is "self-executing," and confirms that Article 33 is self-executing. Article 34 provides in full as follows:

The Contracting States shall *as far as possible* facilitate the assimilation and naturalization of refugees. They shall in particular *make every effort* to expedite naturalization proceedings and to reduce *as far as possible* the charges and costs of such proceedings."¹⁰²

Because of its "precatory" language, its express contemplation of future affirmative acts, and its ambiguity concerning what is required, Article 34 is exactly the kind of treaty provision that has always been thought to be unenforceable in court without legislative fleshing out, and the Supreme Court accordingly so held in *Stevic*.¹⁰³ By contrast, because it imposes a clear, unambiguous and immediately effective obligation and establishes correlative rights of individuals, Article 33 is

97. Cf. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (lack of "judicially discoverable and manageable standards" reduces likelihood that legal provision will be enforceable in court).

98. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

99. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

100. *Head Money Cases*, 112 U.S. at 598-99.

101. Indeed, the Court in *Stevic* and *Cardoza-Fonseca* relied on Article 33's text and history in interpreting the corresponding provision of the Refugee Act.

102. July 28, 1951, 189 U.N.T.S. 150, art. 34 (emphasis added).

103. 467 U.S. at 428-29 n.22. For another example, see *Sei Fujii v. State*, 242 P.2d 617 n.2 (Cal. 1952), discussed in Vázquez, *supra* note 19, at 1123 & n.150.

exactly the type of provision that has consistently been considered self-executing. Thus, in the very same discussion referred to above, the Supreme Court in *Stevic* expressly recognized that Article 33 conferred upon refugees a "right . . . to avoid deportation," a right that the refugee himself could "assert" in adjudication and that the Attorney General was required to "implement."¹⁰⁴ A provision that confers a right is the very opposite of a provision that is precatory or otherwise not judicially enforceable.

Indeed, it is difficult to conceive of a situation in which an immediately effective, mandatory treaty obligation *not* to perform a well-defined act would require legislative implementation. As the court said in *Commonwealth v. Hawes*,¹⁰⁵ a decision characterized as "very able" by the author of *Head Money Cases* in an opinion for the Court two years later:¹⁰⁶

When it is provided by treaty 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."¹⁰⁷

When the obligation is prohibitory, unambiguous, and immediately effective, congressional "implementation" would simply repeat the prohibition and emphasize that "we mean it." The Supremacy Clause dispenses with the need for such embellishment.¹⁰⁸

104. 467 U.S. at 428-29 n.22.

105. 6 Ky. (13 Bush) 697 (1878).

106. *United States v. Rauscher*, 119 U.S. 407, 428 (1886). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 111 (1987).

107. 6 Ky. (13 Bush) at 702-03.

108. The government argued in *McNary* that Article 33 was not self-executing precisely because Congress engaged in such embellishment by enacting the Refugee Act of 1980. But, as the Supreme Court has already recognized, the Refugee Act's amendments to the withholding-of-deportation provision were made "for the sake of clarity." See *supra* note 59 and accompanying text. Moreover, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Russello v. United States*, 464 U.S. 16, 26 (1983) (quoting *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983), which in turn quoted *United States v. Price*, 361 U.S. 304, 313 (1960)). The views of a subsequent Congress are obviously an even more hazardous basis for inferring the meaning of an earlier treaty.

V. ARTICLE 33 MAY BE ENFORCED JUDICIALLY EVEN IF IT DOES NOT CONFER A PRIVATE RIGHT OF ACTION

The government also argued in *McNary* that Article 33 was non-self-executing in a very different sense than those described above. It contended that Article 33 is not self-executing because it does not itself establish a private right of action. The government argued that a treaty must be self-executing in this sense in order to be enforced by an individual in a court: "[A]n individual can enforce a treaty in court only to the extent that the treaty provides a directly enforceable private right of action."¹⁰⁹

The quoted statement is insupportable. Although a treaty that does not itself confer a right of action may be described as not "self-executing" in respect to remedies,¹¹⁰ a treaty may be enforced by individuals in court even if it is not self-executing in this sense. If there is another source for the plaintiff's right of action, a treaty may be enforceable in court as long as it is self-executing in the sense that it itself establishes the defendant's obligation to behave in a given way towards the plaintiff—in other words, if it establishes the defendant's primary obligation and the plaintiff's correlative primary right.¹¹¹ As shown above, Article 33 plainly is self-executing in the sense that it itself establishes the United States' obligation not to return refugees to a country in which they would be persecuted, and the refugees' correlative right not to be returned.

In numerous treaty cases, the right of action was conferred not by the treaty itself, but by the common law; the treaty merely established the defendant's duty (and the plaintiff's correlative right).¹¹² In other

109. Defendants' Opposition to Entry of Injunctive Relief at 25, *Haitian Ctrs. Council v. McNary*, No. 92 Civ. 1258 (E.D.N.Y. June 9, 1992), *rev'd*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992).

110. Cf. Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1112 (1991) (asking whether constitution may be said to be self-executing in regard to remedies). See generally Vázquez, *supra* note 19, at 1117-19.

111. The distinction between a right and a right of action is a familiar, if often overlooked, one. The Supreme Court has held that,

"[i]n determining whether a federal right has been violated, we have considered [1] whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for all certain kinds of treatment.' [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' [3] We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff."

Dennis v. Higgins, 111 S.Ct. 865, 871 (1991). If there is a "right," the right of action may be conferred by, *inter alia*, 42 U.S.C. § 1983. See *id.* See generally Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233 (1991) (distinguishing between "primary rights" and "remedial rights."). The first two characteristics of a "right" listed above are easily met by Article 33 for the reasons set forth above. The third is more properly conceived as a standing requirement. Clearly, Article 33 was "intended to benefit" refugees.

112. See, e.g., *Florida v. Furman*, 180 U.S. 402 (1901) (action to remove cloud on legal title); *Botiller v. Dominguez*, 130 U.S. 238, 243 (1889) (ejectment); *Hauenstein v. Lynham*, 100 U.S.

cases, the right of action was conferred by federal or state statute.¹¹³ The plaintiffs in *McNary* relied on the APA for their right of action.¹¹⁴ The APA provides a right of action for declaratory and injunctive relief to persons suffering "legal wrong" as a result of federal agency action.¹¹⁵ Because Article 33 is the law of the land, agency action that violates that provision inflicts a "legal wrong" and entitles persons "adversely affected or aggrieved by such action" to judicial review thereof.¹¹⁶ A person has standing to pursue an APA action if he or she is within the "'zone of interests' sought to be protected" by the Article 33.¹¹⁷

The APA right of action is unavailable if "statutes preclude judicial review" or if the challenged action is committed to agency discretion by law.¹¹⁸ The second exception is inapplicable here, however, because Article 33 removes any discretion that the Attorney General may have previously enjoyed to turn refugees over to their persecutors. The government argued in *McNary* that the Immigration and Nationality Act is a statute precluding judicial review under the APA of an Article 33 *nonrefoulement* claim.¹¹⁹ I do not examine this claim here, except to observe that a right of action to enforce a law is presumptively available under the APA even if the law itself does not include a "separate indication of . . . an intent to make agency action reviewable under

483 (1879) (action "pursuant to a law of the State"); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 462-63 (1819) (bill in equity); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 277 (1817) (ejectment); *Harden v. Fisher*, 14 U.S. (1 Wheat.) 300, 303 (1816) (same); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 255 (1829) (same); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 256 (1795) (action in debt). See also Vázquez, *supra* note 19, at 1144 & nn.256-58.

113. See *Chew Heong v. United States*, 112 U.S. 536 (1884) (habeas corpus action based on treaty provision); *Asakura v. Seattle*, 265 U.S. 332 (1924) (state action for injunction); *Jordan v. Tashiro*, 278 U.S. 123 (1928) (state mandamus action).

114. The self-execution decisions in which the court considered whether the treaty conferred a right of action were cases in which the plaintiff sought damages against private parties. See, e.g., *Tel-Oren v. Libya*, 726 F.2d 774, 775 (D.C. Cir. 1984); *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1290 (3d Cir. 1979); *Dreyfus v. Von Finck*, 534 F.2d at 26. The APA thus did not supply a right of action, and the court could discern no other basis for the right of action. Under such circumstances, it is appropriate for the court to consider whether the treaty confers the right of action. But the treaty need not confer a right of action if the plaintiff seeks declaratory or injunctive relief against federal officials. The right of action in such cases is furnished by the APA.

115. See *Japan Whaling, Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

116. 5 U.S.C. § 702 (1988). The APA affords a right of action to challenge agency action that is unlawful because it violates a treaty. See Vázquez, *supra* note 19, at 1147-48. Indeed, the government conceded in *Baker* that, "assuming that Article 33 imposes the obligations plaintiffs assert and were 'self-executing' in some broader sense, the current action for injunctive relief could . . . proceed as an APA action, and would therefore be subject to APA limitations." Reply Brief for Appellants at 18 n.22, *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991)(No. 91-6060), *cert. denied*, 112 S. Ct. 1245 (1992).

117. See *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990)(citation omitted).

118. 5 U.S.C. § 701 (1977 & Supp. 1992).

119. See, e.g., Brief for Appellees at 59-60, *Haitian Cts. Council v. McNary*, 969 F.2d 1350 (2d Cir.)(No. 92-6144), *cert. granted*, 113 S. Ct. 52 (1992)(No.93-344)(arguing that the INA is a "statute preclud[ing] judicial review" under the APA of a claim by a refugee who is not "physically present in the United States or at a land border or port of entry.").

the APA," and that this presumption can be overcome only by "clear and convincing legislative intent to preclude review."¹²⁰ For present purposes, it is sufficient to note that the question whether plaintiffs have a right of action is distinct from the question whether Article 33 is judicially enforceable,¹²¹ and that a right of action to enforce a treaty need not have its source in the treaty itself.

VI. CONCLUSION

The United States government has long been arguing in the courts that the *nonrefoulement* obligation embodied in Article 33, the core obligation assumed by the United States when it ratified the Refugee Protocol,¹²² is not judicially enforceable because it is not self-executing. Contrary to the government's contention, Article 33 is the "supreme Law of the Land" by virtue of the Supremacy Clause, and it imposes an immediately effective, well-defined obligation not to return refugees to their persecutors. Our accession to the Protocol in 1968 itself had the effect of prohibiting the Attorney General (and all other government officials in this country) from returning refugees to their persecutors. Article 33 thus gave refugees a correlative "right" and "entitlement" not to be so returned. This right is perfectly susceptible to judicial enforcement. A person seeking to enforce Article 33 affirmatively must of course possess a right of action, but the right of action may be conferred by statutes or the common law, state or federal. It need not be conferred by the treaty itself. In the absence of a "clear and convincing legislative intent to preclude [judicial] review,"¹²³ the APA would confer a right of action for declaratory and injunctive relief to enforce Article 33.

It bears emphasizing, however, that a conclusion that Article 33 is not self-executing (in any of the senses discussed in this Article) is not a conclusion that the policy embodied in the Kennebunkport Order is legal. It is merely a conclusion that the courts may not intervene to stop a violation of our international treaty obligation.

120. See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). See also *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

121. For example, even if the APA right of action were not available to enforce Article 33 against federal officials, § 1983 would be available to enforce the provision against state officials. Thus, if a state official were to return a refugee to his persecutors, the refugee would have a right of action under § 1983 for damages, as well as injunctive or declaratory relief, as long as Article 33 is self-executing in the respects discussed in Sections II-IV, *supra*. Section 1983 confers a right of action for damages and injunctive relief on persons deprived of their treaty rights by state officials. See generally Vázquez, *supra* note 19, at 1146-47.

122. See GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 72 (1983).

123. See *supra* note 120.