2006

Judicial Enforcement of Treaties: Self-Execution and Related Doctrines

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JUDICIAL ENFORCEMENT OF TREATIES:
SELF-EXECUTION AND RELATED DOCTRINES

The panel was convened at 9:00 a.m., Saturday, April 1, by its chair, Carlos Vázquez of Georgetown University Law Center, who introduced the panelists: Robert Dalton of the U.S. Department of State; Vasan Kesavan of D.B. Zwirn & Co.; and Ann Woolhandler of the University of Virginia School of Law.*

INTRODUCTORY REMARKS BY CARLOS M. VÁZQUEZ†

This morning we will be discussing the judicial enforcement of treaties in the United States. In particular, I would like to focus on the relationship between a treaty’s status as self-executing or not, and the question of its judicial enforceability.

The circumstances in which treaties may be enforced in court by individuals arises in three high-profile cases currently before the Supreme Court. In *Hamdan v. Rumsfeld*, an individual challenges the validity of the military commissions created by the president shortly after the attacks of September 11, 2001. He argues that the president’s order calling for the creation of the commissions violates the constitutional separation of powers and the Geneva Conventions. The U.S. Court of Appeals for the District of Columbia Circuit (with then-Judge John G. Roberts concurring) held that the individual rights conferred by the Geneva Conventions were not enforceable in domestic courts. In reaching that conclusion, the court relied on the proposition that treaties are compacts between nations, typically enforceable through diplomatic negotiation, not in domestic courts.

The other two cases involve the Vienna Convention on Consular Relations, a concededly self-executing treaty that provides, inter alia, that nationals of one state party detained by officials of another state party have a right to be informed without delay that they have a right to confer with their consul. In *Sanchez-Llamas v. Oregon*, a criminal defendant sought to suppress a statement he gave to the police before he was notified of his right to communicate with his consul. The Oregon courts denied the requested relief on the ground that the rights conferred by the Vienna Convention are not judicially enforceable. In *Bustillo v. Johnson*, a habeas corpus petition was filed by a prisoner who was convicted of murder without ever having been informed of his right to communicate with his consul. He argues that, if he had been informed of this right, the consul would have buttressed his argument at trial that the murder had actually been committed by another Honduran national then living in Virginia.

Before the Supreme Court, the U.S. government argues in all three cases that treaties are generally compacts between nations with which domestic courts have nothing to do. While acknowledging that treaties may sometimes be judicially enforceable, the Solicitor General argues that this is a narrow exception to the general rule that treaty disputes are for diplomatic

* Mr. Kesavan did not contribute remarks.
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Id. at 38–40.
See Brief of Petitioner, Bustillo v. Johnson, No. 05-51 (Dec. 2005).
resolution. To fall within the exception, he claims, the treaty must clearly specify that it is judicially enforceable. 7

The Solicitor General’s position is in substantial tension with the constitutional text. Article VI provides that treaties are the “‘supreme Law of the Land,’” and instructs judges to give them effect. This suggests that judicial enforceability is the rule, and that doctrines that preclude judicial enforcement are the exception.

Nor is the Solicitor General’s position supported by the decisions on which it relies. Taking a page from John Yoo, 8 the Solicitor General relies on Foster v. Nielson for the idea that treaties are contracts between states, not legislative acts. 9 But the Supreme Court in Foster was actually making the opposite point. While observing that treaties are not considered to have legislative effects in other countries, it stressed that

[i]n 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. 10

The Solicitor General, and the D.C. Circuit in Hamdan, also rely on language from Head Money Cases to the effect that “[a] treaty is primarily a compact between independent nations [which] depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it,” and accordingly “[w]hen a violation of a treaty nonetheless occurs, it ‘becomes the subject of international negotiations and reclamations,’ not judicial redress.” 11 But here, too, the Court was referring to the effect of treaties in the absence of the Supremacy Clause. The Court made it clear that, because of the Supremacy Clause, treaties that “prescribe a rule by which the rights of the private citizen or subject may be determined” are to be regarded as equivalent to an act of the legislature, and hence to be “enforced in a court of justice.” 12

Indeed, the Supreme Court made it clear two years later in United States v. Rauscher that the language from Head Money Cases on which the Solicitor General relies was describing the effect of treaties in Great Britain, which does not have a Supremacy Clause. 13 As the Court made clear in Rauscher, Head Money Cases addressed “the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations.” 14 Because treaties are declared by the Constitution to be the supreme law of the land, the Court emphasized in Rauscher that “the courts are bound to take judicial notice [of them], and to enforce in any appropriate proceeding the rights of persons growing out of [them].” 15

7 See Brief of Respondents at 30–32, Hamdan v. Rumsfeld, No. 05-184 (Feb. 2006).
9 Brief of Respondents, supra note 7, at 30.
11 See Brief of Respondents, supra note 7, at 30 (quoting Head Money Cases, 112 U.S. 580, 598 (1884)).
12 Head Money Cases, 112 U.S. at 598–99. See also Handman, 415 F.3d at 38–39.
13 See United States v. Rauscher, 119 U.S. 407, 417 (1886), where the Court made clear that the passages cited by the Solicitor General and the Court of Appeals address the “difference between the judicial powers of the courts of Great Britain and of this country in regard to treaties.”
14 Id. at 418.
15 Id. at 419. See generally Brief of Louis Henkin et al. as Amici Curiae, Hamdan (No. 05-184).
Not all treaties are enforceable in court. Historically, a treaty’s enforceability in court has been addressed by courts through the doctrine of self-execution. This is consistent with the Court’s statement in Foster that a self-executing treaty is “to be regarded in courts of justice as equivalent to an Act of the Legislature.” I have previously written that the concept of a non-self-executing treaty masks several distinct types of reasons why a treaty might not be judicially enforceable even though it is the “supreme Law of the Land.”16 But while the grounds for finding a treaty self-executing might vary, the effect of a finding that a treaty is self-executing is clear. As the Court made clear in Foster and Head Money Cases, a self-executing treaty is enforceable in the courts of justice in the same circumstances as a statute having the same content.

A party relying on a self-executing treaty might still lose. For example, he might lose because the treaty does not confer a private right of action. But a private right of action is not necessary if the party invokes the treaty defensively, or pursuant to a right of action conferred by another law.17 This is the case in Sanchez-Llamas, where the treaty was invoked by a criminal defendant, and in Hamdan and Bustillo, in which the treaty was invoked by a habeas petitioner.18 The party invoking the treaty might also lose because the treaty does not support the remedy he seeks. Thus, the Court might find that the Vienna Convention does not support the suppression of a statement given before consular notification is given.

But the fact that a treaty is self-executing does rule out one basis for denying relief to a party relying on the treaty. It rules out the conclusion that the treaty is not judicially enforceable because it is a contract between states that is for diplomatic enforcement only. If a treaty is self-executing, it is to be treated like an act of legislation. It should therefore not be denied enforcement because it is “merely” a compact between states.

REMARKS BY ROBERT E. DALTON*

My remarks focus on three aspects of the subject that the panel has been asked to address. Since I have had the privilege of working on a broad range of issues relating to U.S. treaties, including many of the issues being examined by this panel, those remarks will draw more on practice than on theory.

The first is the need to agree on a new vocabulary of legal terms to denote each of the possible meanings of the term “self-executing.” Establishment and use of this new taxonomy should permit more precise discussion of various aspects of self-execution and help to dispel some of the confusion which lawyers, judges, and scholars currently face.

The second part of my remarks examines the judicial enforcement of self-executing provisions of the Panama Canal Treaty to transfer the canal to Panama and to establish private rights for various individuals—both citizens and aliens.

The third examines the related “last-in-time” rule governing the relationship between treaties and statutes in the event that there is a conflict between a self-executing treaty and a statute. While the rule was established by the Supreme Court more than a century ago, it is being questioned by some scholars. I will examine a recent instance in which the existence of the rule made it possible to resolve an important foreign policy difference with another

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17 See id. at 719–22.
18 Even the Court of Appeals in Hamdan recognized that “[t]he availability of habeas may obviate a petitioner’s need to rely on a private right of action.” Hamdan, 415 F.3d at 40 (citing Wang v. Ashcroft, 320 F.3d 130, 140–41 & n.16 (2d Cir. 2003)).
* Senior Adviser to the Legal Adviser, U.S. Department of State.
country and argue that abandonment of the rule would deprive the United States of a valuable tool that provides it flexibility in resolving issues that arise from time to time in the conduct of its foreign affairs.

When I first encountered the concept of self-executing treaty, I was urged to read the then-leading article on that topic by Alona Evans. For Professor Evans, there was one meaning only: a treaty was self-executing if there was no need for legislation to implement the treaty. Our chairman, in his important 1995 article on the subject, identified four doctrines of self-executing treaties. Unfortunately, when one looks at the literature and considers the practice, it is clear that "self-executing" has become an ambiguous term devoid of generally accepted meaning.

It is often unclear to an American reader which meaning the user had in mind. I am sure many of you have had the experience, as I have, of encountering the use of the term "self-executing" by the same writer in similar contexts but in different senses, and wondering if the second use was by choice or by chance. The risk of confusion for the foreign reader—particularly one from a dualist legal system who is most likely to understand self-executing as meaning solely that there is no need for implementing legislation—is very high. Such a reader is unlikely to know that there are at least three other possible meanings of "self-executing" and is likely to be misled if the user had in mind one (or several) of them. The prescription for a better understanding of the "most confounding" doctrine that we are examining may well be the development of a cluster group of new legal terms to denote each meaning of the term that seem to have proliferated in recent years. Such a development would promote greater clarity of discussion and permit the making of intelligible distinctions among the possible meanings that have attached themselves like barnacles to a concept that was once less confounding.

Before leaving this topic, I would like to respond to questions raised by the chairman as to the frequency with which questions of the self-executing nature of treaties arise in U.S. practice. A survey of bilateral treaties would, I think, suggest that most are self-executing. Some of those treaties, especially friendship, commerce, and navigation treaties, provide individual rights to aliens; cases such as Asakura v. City of Seattle, have found them to be judicially enforceable. Other treaties, such as those in the extradition and prisoner transfer field, do not require legislation because there are existing statutes that establish a legal framework for their application. A survey of multilateral treaties might establish a larger percentage of non-self-executing treaties. This is so because a significant number of multilateral treaties today deal with law enforcement and anti-terrorism. Treaties in those fields often require criminalization of conduct that falls within the legislative powers of Congress. Treaties regulating intellectual or industrial property, too, are likely to require implementing legislation. On the other hand, treaties providing a uniform system of rights and obligations, such as those in the 1999 Convention for the Unification of Certain Rules for International Carriage of Passengers and Goods by Air, are often self-executing and will be judicially enforced.

The controversy concerning the power of the president and two-thirds of the Senate to transfer the Panama Canal and the Canal Zone to Panama by self-executing provisions of

2 265 U.S. 332 (1924).
3 The 1999 Convention is the latest of a series of such treaties beginning with the Warsaw Convention of 1929. Cases under that convention and its progeny have substantially contributed to the development of the rules of treaty interpretation by U.S. courts.
an advice and consent treaty was decided by *Edwards v. Carter*, a case brought prior to the Senate vote by sixty members of the House of Representatives in an attempt to prevent the proposed transfer. While treaties for the acquisition of territory generally require appropriation of funds and thus a role for the House of Representatives, this transfer by the United States was of a different character. The provisions relating to the transfer were drafted so as to avoid the necessity for the appropriation of funds by the United States. The Senate subsequently gave its advice and consent to ratification of the treaty by the requisite majority, and the treaty entered into force on October 1, 1979.

Following the self-executing transfer, Panama granted the United States the right to operate the canal for a transition period of approximately twenty years. During that period, a number of appropriations were necessary, and the Congress approved them as part of the Panama Canal Commission Authorization Act of 1986, and other legislation.

When scholars analyze U.S. treaties, their focus tends to be on the principal elements of those treaties rather than on subsidiary provisions that may have been essential for the conclusion and effective execution of those treaties. The Panama Canal Treaty consists of fourteen articles, an annex, and an agreed minute. In addition, the parties concluded separate agreements on the implementation of Articles III and IV of the treaty dealing, respectively, with canal operation and management and with protection and defense of the Canal. These various documents contain provisions that appear to establish a variety of private rights. For example, Article X of the treaty itself deals with employment with the Panama Canal Commission, a new body established by the treaty. Paragraph 7 of Article X provides preferred placement rights in other U.S. government jobs for persons employed by the Panama Canal Company prior to the entry into force of the treaty who are displaced from their employment as a result of the discontinuance by the United States of certain activities pursuant to the treaty. Paragraph 10 provides for optional early retirement benefits for those employees and obligates the United States to seek special legislation for more liberal entitlement to, and calculation of, retirement annuities than were currently provided for them.

Article XV of the Agreement Pursuant to Article III of the Canal Treaty provides tax exemption for U.S. citizen employees and dependents as a result of their work for the Commission. Although the Agreement pursuant to Article III is an executive agreement pursuant to a treaty, some of the persons mentioned sued for a refund of all federal income tax paid on income derived from their employment with the Commission.

Additional provisions relating to private rights, including at least one provision pertaining to Panamanians, might be gleaned from the Panama Canal Treaty and its related documents, but that seems unnecessary within the context of this synopsis. The purpose of highlighting provisions of the Panama Canal Treaty that establish private rights and appear not to require implementing legislation is to suggest that we may be underestimating the extent to which private rights are contained in provisions of U.S. treaties. The literature has tended to focus on non-self-executing declarations included by the Senate in its resolutions of advice and consent to human rights treaties. More comprehensive research into the texts of U.S. treaties might identify additional provisions that could be examined in connection with further discussion of the broader issue.

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5 33 UST 39, TIAS 10030.
The final section relates to the later-in-time or last-in-time rule. The rule provides that if there is a conflict between a self-executing treaty and a statute, the courts as a matter of domestic law will apply the later-in-time. The rationale for the rule generally begins with the statement that treaties and laws of the United States are both the supreme law of the land under Article VI of the Constitution. As a result, the statement continues, if the conflict cannot be resolved, then the courts will apply the later one.

Typically it is the statute that is inconsistent with an earlier treaty. But in United States v. The Schooner Peggy, the Supreme Court held that insofar as a treaty operates of its own force as municipal law, it supersedes a prior inconsistent act of Congress. And in Charlton v. Kelly the Supreme Court observed “Of course, the effect of the supplementary treaty of 1884, being later than the statutory requirements . . . , is to supersede the statute insofar as there is a necessary conflict in the carrying out of the extradition obligation between this country and Italy.”

Although the rule has been generally accepted for more than two hundred years and recently affirmed by the Supreme Court, some international lawyers are uncomfortable with it. In addition, several academics have recently expressed the view that the premise for the rule is flawed—that Article VI of the Constitution does not give equal status to statutes and treaties. Yet the rule is not without its defenders. Professor Rodgers finds that the rule “reflects a general and appropriate restraint on the part of the courts to avoid getting involved in the interplay between the law making power of the Treaty Makers and that of Congress. . . . When two valid legislative acts—a statute and a self-executing treaty provision—are interpreted to conflict with each other, the courts are . . . in no position to decide which is preferable. The only alternative is to apply the most recent enactment of a federal body having the power to legislate, whether it is the Congress or the Treaty-Makers.”

In contrast to the largely theoretical concerns of some academics as to the basis for the rule, substantial practical consequences would flow from its abolition since the United States would no longer have the possibility of negotiating a treaty excepting a particular country from application of a statute that the Congress would be unwilling to repeal in its entirety. The value of this existing foreign policy tool is illustrated by the conclusion of the treaty between the United States and Iceland to facilitate their defense relationship, signed at New York on September 24, 1986.

Under the 1951 United States-Iceland Defense Agreement Pursuant to the North Atlantic Treaty, the United States and Iceland had long maintained arrangements for the use of defense facilities in Iceland. For approximately fourteen years prior to 1984, Icelandic vessels had carried all the cargos to and from the military base there. Following the initiation of regular service to and from Iceland by a newly formed U.S. flag carrier in 1984, the Department of Defense shipped cargo for the base at Keflavik on the U.S. carrier to the extent of its availability, as required by applicable U.S. cargo preference laws. This shift sharply reduced the transportation of military cargo on Icelandic shipping lines.

In light of Iceland’s position that failure to resolve the matter could adversely affect the long-term defense relationship between the United States and Iceland, the two countries opened negotiations that led to the conclusion of the 1986 treaty. An implementing agreement,
in the form of a Memorandum of Understanding, provides specific details as to how awards for the carriage of such cargo are to be allocated following the receipt of bids from carriers of both countries.

Rather than relying generally on the last-in-time rule, the parties incorporated in the text a specific article (Article IV) to supersede application of cargo preference laws, principally the U.S. 1904 Cargo Preference Act, to the treaty. That article reads as follows: ‘‘The provisions of this Treaty and any implementing arrangements concluded pursuant to Article I shall apply notwithstanding any prior inconsistent law or regulation of the United States of America or the Republic of Iceland.’’

Since the provision in Article IV may be unique in U.S. practice, a legitimate question is why it was thought necessary. There was substantial concern throughout the maritime community that, notwithstanding the national security interests that the treaty was designed to promote, the exception to application of the Cargo Preference Act to military shipments to Iceland could lead to pressure for similar exceptions for other countries and a weakening of the act. Taking this concern into account, the report of the Senate Foreign Relations Committee on the treaty recommended that the Senate advise and consent to ratification only with specified assurances of the State and Defense Departments, the most important of which seems to have been that the treaty would not be understood as, or appear to be a precedent for, similar weakening of the 1904 Cargo Preference Act in other trades. Such assurances were given at the Committee hearing held on September 30, 1986.

I very much appreciate having heard the views of other members of the panel and look forward to answering any questions my remarks may have prompted. As suggested by my comments concerning the last-in-time rule, I take the view that treaties and statutes are of equal dignity as the supreme law of the land. I therefore do not share the views of those who consider treaties to be of lesser dignity and would give them less consequence.

REMARKS BY ANN WOOLHANDLER*

Discussion of the issue of self-execution begins with the Supremacy Clause, which makes the Constitution, laws, and treaties of the United States the supreme law of the land. Based on this provision, Carlos Vázquez and many other international law scholars argue that treaties should ordinarily be understood as establishing rules of decision for American courts even in the absence of implementing legislation. Otherwise, they claim, courts would be treating treaties less favorably than the other forms of law mentioned in the Supremacy Clause. While treaty maximalists discuss the matter as if they merely wanted treaties to be put on an equal footing with the Constitution and laws, they seem at times to want treaties to be as presumptively enforceable as the United States Constitution, and treated more favorably than federal statutes.

On the other hand, some scholars maintain that treaties should indeed receive less favorable treatment than the other categories of federal law. For example, John Yoo has argued that treaties covering matters within Congress's Article I powers should always be non-self-executing. More moderately, our panelist Vasan Kesavan has argued that treaty provisions should not be self-executing if they conflict with an earlier-in-time federal statute.

13 Id.

* Professor, University of Virginia School of Law.
TREATING TREATIES LESS FAVORABLY THAN STATUTES

Although Vasan claims that courts have generally applied the last-in-time rule to let federal statutes trump treaties, rather than vice versa, there may possibly be more instances of treaties' trumping federal statutes than he has noted. For example, in the Schooner Peggy case, a treaty with France appears to have trumped a claim pending on appeal for forfeiture of a French vessel under a federal statute. Perhaps Schooner Peggy falls within Vasan's treaty-of-peace exception to his general claim that treaties do not trump preexisting statutes, but that exception does seem to put a bit of a hole in his statutory priority claim.

But even if there may possibly be a few more instances of treaties' trumping federal statutes out there, Vasan's theory has some things going for it. As a descriptive matter, it coincides with Tim Wu's conclusion that treaties are rarely found to be self-executing in areas where there are detailed congressional statutes already in existence (as there are with respect to intellectual property and tariffs, for instance). For Tim, this is in line with his theory that the courts' finding a treaty self-executing to a large extent depends on who breaches the treaty.

Perhaps another way to characterize the phenomenon that treaties conflicting with preexisting federal statutes are unlikely to be deemed self-executing is to say that treaties that are too discordant with domestic regimes of judicially enforceable rights and remedies are less likely to be found enforceable. This reason may have more to do with presumptions about ratifiers' intent than with constitutional limitations on treaties' efficacy. But it does seem to be true that when a treaty creates novel rights beyond those that are currently domestically enforced or creates remedies that seem disproportionate to the violation, it is less likely to be judicially enforced.

Thus the historical paradigm of the self-executing treaty fit easily into domestic rights and remedies regimes. Historically, the treaty most likely to be considered self-executing was one giving aliens the same privileges and immunities as citizens—that is, rights to have one's contracts enforced, rights to own land and not have it confiscated, and rights to inherit and engage in the common occupations. To apply these treaties, the federal courts merely had to look to rights that already existed for citizens under state law, as they did when applying Article IV's interstate privileges and immunities clause for out-of-staters, or to the rights they enforced under the Contracts Clause.

One can contrast treaties giving aliens the same rights and remedies as citizens, with treaties adding rights and remedies, whether it be intellectual property treaties, or human rights treaties claimed to supplement constitutional protections for citizens and aliens alike. Thus, while I would not go so far as Vasan to say that the existence of federal statutes necessarily makes a treaty non-self-executing, I might as a practical matter often end up in the same place. When one seeks to ascertain the ratifiers' likely intent, the discordance of treaties with domestic regimes of rights and remedies may be a factor in determining that a treaty is non-self-executing.

TREATING TREATIES BETTER THAN STATUTES

While Vasan would let earlier statutes trump later treaties, treaty maximalists like Carlos sometimes seem to want treaties to operate as if they were of constitutional rather than statutory status. For example: (1) some would entertain a very strong presumption that treaties

1 5 U.S. (1 Cranch) 103 (1801).
provide law to be applied by the courts; (2) some argue for ignoring domestic treaty ratifiers’ intent, and are thus hostile to reservations, even though statutory intent remains important in interpreting domestic statutes; (3) some may favor easy implication of rights of action along the lines of Bivens, even though implied rights of action have become increasingly uncommon for domestic statutes; while (4) some seek generous remedies, comparable to those more routinely given for constitutional than statutory violations.

We can see some of these tendencies at work in the Vienna Convention consular notification cases currently before the Court, Sanchez-Llamas and Bustillo. These cases narrow the self-execution issues in that (1) the Convention creates duties that at least arguably run from nations to individuals; and (2) the individuals who want to enforce treaty-created duties are not seeking an implied right of action, but only enforcement of a treaty right within an existing cause of action. The treaty maximalists might now argue that the petitioners in these cases only ask that treaties be enforced to the same extent as domestic federal statutes— which presumptively provide law to be applied where there is an existing cause of action.

But even should the Court deny relief to the petitioners, the Court would not necessarily be treating treaties worse than statutes. To say that statutes are presumptively self-executing, and thus supply law to be applied in the courts, does not tell you who may enforce such law, in what circumstances, and for what remedies. Consider recent cases addressing when Section 1983 can be used to enforce federal statutes (as opposed to the Constitution). In Gonzaga Univ. v. Doe, the Court held that an individual could not enforce the Family Educational Rights and Privacy Act’s restrictions on the release of student records. The Court looked at congressional intent, particularly as evidenced by the language of the statute, and the alternative executive enforcement remedies therein provided, and determined that Congress had not intended to create individually judicially enforceable rights.

The inquiry in the treaty cases is similar, as Tim Wu has pointed out. Although the parties in the Vienna Convention cases may start with differing presumptions of whether the treaty should be judicially enforceable, the briefs on both sides look to intent of framers and ratifiers, as manifested both in treaty language and in the alternative remedies of political branch enforcement. The issues of intent to create individually enforceable rights in both contexts are quite similar, and it is difficult to say that treaties are getting treated much worse than domestic federal statutes.

What is more, the factor I mentioned previously when discussing Vasan’s views—whether the claimant is seeking novel rights or disproportionate remedies—is frequently an implicit and explicit concern in statutory as well as treaty cases. Consider, for example, Ranchos Palos Verdes v. Abrams, in which a plaintiff sought to enforce through Section 1983 his claim that the city had, in violation of the federal Telecommunications Act, refused to allow him to build a radio tower on his property. The Act had fairly bare bones judicial review provisions, and the plaintiff had enforceable individual rights thereunder. But the Court held there was no congressional intent to make the statute enforceable through Section 1983, which would have added on the heavy-handed remedies of damages and attorneys’ fees for a difficult land use decision.

Treaty maximalists might argue that such concern about discordant remedies have more force when someone seeks damages and attorneys’ fees than when someone raises a treaty

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2 Sanchez-Llamas v. Oregon, No. 04-10566; Bustillo v. Johnson, No. 05-51. The author joined an amicus brief in support of the respondent in Bastillo.
defensively in a criminal proceeding, as in the Vienna Convention cases. But too broad a recognition of rights and remedies is a major concern in the criminal context—as may be shown by other countries’ not generally remedying violations of the Vienna Convention within the criminal trial process.

To be sure, one might at first assume that the individual enforcement of consular notification rights and remedies would fit well within our criminal procedure regime, where they have a facial resemblance to the rights to be told of the availability of counsel under the Fifth and Sixth Amendments. This resemblance, however, is more facial than real.

First, let me repair to my point that treaty maximalists want to equate treaties with constitutional rights. In *Sanchez-Llamas*, the petitioner is arguing that Oregon’s failure to inform him of his right to consular notification should lead to the suppression of evidence—a remedy analogous to that in *Miranda*, and one that we reserve principally for constitutional violations rather than statutory ones. Similarly, the petitioner in *Bustillo* is arguing that a similar violation of the Vienna Convention should be cognizable on habeas—a remedy that again has generally been reserved for constitutional and not statutory defects. Indeed, *Bustillo*’s further argument that the courts should ignore his procedural defaults would treat Vienna Convention violations more favorably than most constitutional violations.

Second, even apart from the fact that the remedies proposed are more frequently used for constitutional than statutory rights, the remedies that the defendants seek in the criminal process may be disproportionate to the right they lost. There are important substantive differences between Fifth or Sixth Amendment rights to counsel and the Vienna Convention right to consul. The exclusionary remedy requested in *Sanchez-Llamas* would be more appropriate if the Vienna Convention right were one not to be interrogated without notice of consular rights, which it is not.

Even putting aside an exclusionary remedy and having an inquiry into prejudice (as one might have for an ineffective assistance claim under the Sixth Amendment) may not fit well with the right. In the Sixth Amendment area, when courts ask whether a lawyer’s nonfeasance prejudiced the defendant, they have some benchmark for their inquiry. We assume that attorneys act adversarially to the state, and follow reasonable professional standards. By contrast, when the issue is lack of consular notification, and we look to what might have happened had a consul been notified, there is no necessary adversariness nor a standard of reasonable care against which to measure what might have been. Rather, we may have only hindsight testimony of the vigorous efforts the consul would have made. Thus crafting an appropriate remedy within our existing schemes may be difficult.

In conclusion, I would say that while we need not treat treaties worse than domestic statutes, perhaps we need not treat them a lot better either. Rather, concerns that rights are novel, or that remedies have a poor fit with violations, may be appropriate when courts decide whether individuals should be able to enforce treaties in particular contexts without further congressional action.