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V. Treaties and Federal Question Jurisdiction: Enforcing Treaty-Based Rights in Federal Court

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V. TREATIES AND FEDERAL QUESTION JURISDICTION: ENFORCING TREATY-BASED RIGHTS IN FEDERAL COURT

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A Introduction

Treaties are traditionally construed as agreements freely negotiated and entered into by sovereign nations. Only sovereign states and international organizations can conclude treaties, and these legal instruments create rights and duties under public international law. Yet, often, and increasingly so since World War II, treaties do also touch upon private individuals.[1] For example, the Vienna Convention on Consular Relations ("VCCR") gives individual foreign detainees the right to be promptly notified by public law enforcement officials of their right to contact their consulate.[2] Long gone are the days when treaties were simply a state-to-state matter.[3]

If breached, treaties give rise to international legal responsibility. States might decide to invoke the international legal responsibility of the party that violated the treaty, but they have no legal obligation to do so. It is entirely a matter of discretion; a matter of carefully balancing benefits and costs within the larger political framework. Yet, the more treaties touch upon and aim to regulate interactions between parties across international borders, the more private individuals should be given the possibility of holding other private individuals to the same standards. Indeed, some recent treaties expressly grant individuals rights of action to enforce the treaty's terms in court.[4] For example, as discussed in detail in Part

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1. ABRAM CHEYES & ANTONIA CHEYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 14 (1995) ("[T]reaties are formally among states, and the obligations are cast as state obligations . . . [but t]he real object of the treaty . . . is not to affect state behavior but to regulate the activities of individuals and private entities.").

> Most observers of international law would agree that the past several decades have seen developments in international law that represent a repudiation of many of the premises of the classic model. . . . [International law protecting human rights] impose[s] obligations on states towards individuals as human beings, not just as nationals of other states. . . . [So a] state's obligation[] to behave in certain ways towards individuals [is] no longer thought to be owed to the state of the individual's nationality for the collective benefit of the individuals comprising the state.

Carlos Manual Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1094 (1992) [hereinafter Vázquez, *Treaty-Based Rights*]. This article uses the term "private individual" to refer to what international legal scholars call "private," or a natural or legal person.

2. Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]; *see infra* Part D.2.a.i.A.

3. *See generally* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 894–95, 917–27 (2004) [hereinafter Van Alstine, *Age of Treaties*] (discussing the modern substantive range of self-executing treaties).

4. *E.g.*, Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 97 [hereinafter Hague Convention]; Convention on the

D.2.a.ii, the Hague Convention on the Civil Aspects of International Child Abduction allows one parent to sue the other for the return of their wrongfully abducted child.[5]

However, this expansion of the right to seek enforcement of treaties raises a number of issues, particularly in the U.S. federal system.[6] Could U.S. courts interpret treaties in such a way as to imply private rights of action? If the question is answered affirmatively, then an injured private individual might enforce the treaty's obligations in federal court because treaties "arise under" federal law.[7] Therefore, this interpretative issue has significant implications for federal courts' judicial resources.[8]

However, even if the treaty cannot be interpreted to contain an implied right of action, this article explores the possibility, given the special status of treaties in international and federal law,[9] that state law causes of action could nonetheless vindicate a private individual's treaty-based rights in federal court.[10]

Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; *see infra* Parts D.2.a.ii, D.2.b.ii.

5. Hague Convention, *supra* note 4.

6. Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1889 (2005) [hereinafter Van Alstine, *Good Faith*] (noting that every aspect of treaty law is subject to "heated debate").

7. Indeed, much of the recent scholarly debate has focused on those treaties which do not contain express private rights of action. *See generally* Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145 (1999); John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT'L L.J. 552 (2006); Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433 (2002); Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1126.

8. As Louis Henkin has stated:

> It has been suggested that if human rights conventions were self-executing, they would overwhelm the courts. The fear is mistaken. The vast majority of cases arising under a covenant or convention would be cases that already arise also under the Constitution or civil rights laws. In any event, if the convention is not self-executing, the United States is required to implement it by legislation, and the same cases, and the same number of cases, might then arise under the implementing legislation.

Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 n.23 (1995) [hereinafter Henkin, *Ghost*]; *see also* Rosencranz & Campbell, *supra* note 7, at 154 (noting that one of the reasons for strictly limiting the sorts of wrongs which might qualify as violations of the "law[s] of nations" is a concern for "open[ing] the floodgates" into federal court).

9. "Cases arising under international law . . . are within the Judicial Power of the United States and, subject to constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(2) (1987).

10. *See infra* Part D.2.b.

Treaties are a source of law, both international and national.[11] Being law, federal courts should logically have the power to interpret their provisions. Two reasons for this are the same reasons for believing that federal courts can most properly adjudicate and vindicate federal statutory interests:[12] uniformity of decision-making[13] and expertise.[14] Indeed, both qualities are integral if a federal court's interpretation of a treaty's application to a particular case or controversy could, if cavalier, breach an international obligation.[15]

Be that as it may, in recent history, both the Senate, which gives the President "Advice and Consent" to the ratification of treaties,[16] and the Executive Branch[17] have gone to considerable pains to keep treaties out of courts.[18] For instance, they might declare that a treaty

11. Once a treaty has been ratified, it is not only the "law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers . . . ." Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) (citing U.S. CONST. art. II, § 2). Indeed, "[i]nternational law . . . of the United States [is] law of the United States and supreme over the law of the several States." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1).

12. This perspective is open to much debate. *E.g.*, Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Some scholars strongly believe that not only are state courts just as equipped to interpret and enforce federal law, but they may be better at it. Michael E. Solomine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). See *infra* note 162 for a discussion of one author's view of parity in the context of international custody disputes.

13. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816).

14. In addition, scholars argue that the "express inclusion of treaties within the judicial power of Article III means that final authority over their interpretation also falls within the formal province of the federal courts." Van Alstine, *Good Faith*, *supra* note 6, at 1896.

15. "Finally, and perhaps most importantly, the designation of treaties as 'the supreme Law of the Land' serves to protect against the international embarrassment and friction that would flow from subsequent interference by the legislatures or courts of the individual states." *Id.* at 1897 (arguing for a revival of the doctrine of "good faith" interpretation of treaties).

16. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. CONST. art. II, § 2.

17. Quigley, *supra* note 7, at 554.

18. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1973–74 (1999) [hereinafter Yoo, *Globalism*]. One noted scholar has attributed this to the "ghost" of Senator Bricker. Henkin, *Ghost*, *supra* 8, at 349. A recent example of the Executive Branch completely divesting treaty interpretation from courts is found in the Military Commissions Act of 2006 ("MCA"), signed into law by President George W. Bush on October 17, 2006. Military Commissions Act of 2006, S. 3930, 109th Cong. § 5 (2006). For one, this bill included provisions which completely prevent courts from relying on the Geneva Conventions. *Id.* ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action . . . ."). In addition, the bill gives the President ultimate authority to interpret the Geneva Conventions. *Id.* § 6(a)(3). As such, on its face this law appears to prevent any litigant from invoking the protections

is not "self-executing," thus requiring Congress to pass implementing legislation.[19] Yet, this practice is problematic and is sharply criticized by legal scholars.[20] For one, implementing legislation can be slow in coming,[21] if it comes at all.[22] Once a treaty

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of the Geneva Convention. But the implications of these provisions have been largely overshadowed by controversy about the MCA's suspension of habeus corpus as applied to detainees. *Id.* § 7(a). For a sampling of bloggers' treatment of the proposed and passed legislation, see generally Elisa Massimino, *Human Rights First to Congress: Reject Administration's Military Commissions Proposal*, HUMAN RIGHTS FIRST, Sept. 13, 2006, http://www.humanrightsfirst.org/media/etn/2006/statement/260/; *Countdown Special Comment: Death of Habeus Corpus: "Your words are lies, Sir."* (MSNBC television broadcast Oct. 18, 2006), *available at* http://www.crooksandliars.com/2006/10/18/countdown-special-comment-death-of-habeas-corpus-your-words-are-lies-sir. The MCA's ultimate implications, and indeed, its constitutionality, are unknown. *See* Posting of Mark Moller, Is the Military Commission Act Constitutional?, to Cato-at-Liberty (Oct. 4, 2006), http://www.cato-at-liberty.org/2006/10/04/is-the-military-commission-act-constitutional (noting that the MCA "is not patently unconstitutional—but it is hardly on uncontrovertible constitutional footing, either"); *see also* Posting of Bobby Chesney, *Boumediene v. Bush* (Gov't Brief on MCA impact), to National Security Advisors: A National Security Law Blog (Nov. 15, 2006, 07:58 EST), http://natseclaw.typepad.com/natseclaw/litigation_developments/index.html (discussing the U.S. government's brief arguing the impact of the MCA on the pending appeals in *Boumediene v. Bush*, 450 F. Supp. 2d 25 (D.D.C. 2006), and *Al Odah v. United States*, 406 F. Supp. 2d 37 (D.D.C. 2005), two pending detainee cases).

19. *See infra* Part B.2.

20. Yoo, *Globalism*, *supra* note 18, at 1959–60 (arguing in favor of non-self-execution, despite admitting that critics of his position "count among their number every legal scholar to write on the question").

21. Henkin, *Ghost*, *supra* note 8, at 341 n.1, 347 (noting that President Truman signed and sent the Genocide Convention, Dec. 9, 1948, 78 U.N.T.S. 277, to the Senate in 1949, but it did not come into force in the United States until 1989, and then only with reservations); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 59–60 (1993) (noting that the General Assembly of the United Nations opened the International Covenant on Civil and Political Rights ("I.C.C.P.R.") for ratification in 1966, the United States became a signatory in 1977, but did not ratify the Convention until 1992, and it has never been implemented as such).

22. Some scholars argue that this is because after World War II the United States saw itself as the savior of Western Europe.

> Nineteenth-century judges seemed at pains to show that the United States respected the rules of the international community. . . . [But b]y the twentieth century, that sense had dissipated. The United States had developed a sense of superiority over the Old World. It no longer needed to prove itself . . . [and] World War II reinforced this new perception. The United States had saved the world, at a time when the Old World powers were on their knees.

Quigley, *supra* note 7, at 578–79. This superiority complex means the United States is not concerned with breaching its international obligations. *See id.* This is in marked contrast with the early history of the United States. Van Alstine, *Good Faith*, *supra* note 6, at 1900 n.103. Then, the Framers specifically included the Supremacy Clause in the Constitution, thus adopting the New Jersey Plan to the exclusion of the Virginia Plan, to enable the federal courts to ensure by judicial review that the several states would not violate new international agreements. *Id.* Even so, John Yoo, the classic supporter of "unitary" executive power, believes that non-self-

is ratified and entered into force, it creates obligations under international law, regardless of whether a sovereign state has implemented it domestically. If implementing legislation is delayed, the sovereign state may be violating its obligations under international law.

But first, a little about what this article is and is not. This article attempts first to synthesize a complex area of international law, then narrowly examine a particular use and application of that law—the law of treaties—in the context of United States domestic law, specifically, federal question jurisdiction. This article aims to provide a helpful first look at relevant international principles, before delving more deeply into the intricacies and complexities of the developing use of international law by federal courts to determine whether there is federal jurisdiction in a particular case. This author hopes the reader can use these sources to sharpen her focus in some instances, and provide more background in others.

This author assumes her readers have little knowledge of or experience with international law, and, more specifically, how treaties are—or are not—being used in federal courts to maintain federal question jurisdiction. Accordingly, the novice reader needs to be acquainted with some basic concepts of international law before moving through this article. Therefore, this article attempts to guide the novice reader through a much-simplified international legal landscape before discussing the narrow issue of treaty law in the context of subject matter jurisdiction.[23] In Part B, this article presents a background of United States treaty history to acquaint the reader with the relevant legal landscape. This background includes a history of treaty jurisprudence in the United States in Part B.1 and a discussion of one of its central themes, self-execution, in Part B.2.

In Part C, this article provides an introduction to modern examples of treaties which affect individual rights. This introduction includes a discussion of interpretative principles which generally

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execution is constitutionally preferable because it "maintains a clear separation between the power to make treaties and the power to make domestic law, and it gives Congress the means to limit the potentially unbounded Treaty Clause." Yoo, *Globalism*, *supra* note 18, at 1961.

23. International lawyers may view the broad-brush treatment of international law in Parts A and B of this article as overly simplistic, and, therefore, misleading or incomplete, at best. Accordingly, readers who need a more nuanced understanding of international law principles should look beyond this article to the many sources within this article's footnotes that will help them understand that area of law.

govern treaties and outlines some analytical distinctions that should be maintained in the individual rights analysis. In addition, Part C.2 outlines preliminary "avenues and trails" by which a litigant may plead his or her treaty-based claim in federal court. Finally, this article creates a framework for a discussion of federal subject matter jurisdiction as applied to treaty-based rights in Part D.

This article conveys a decidedly "American" point of view in that it attempts to discuss how federal courts are currently dealing with treaty law when considering whether there is federal subject matter jurisdiction. Some international law experts would strongly disagree with how federal courts are interpreting and using international law. While these experts raise important and interesting preemption and separation of powers issues, this article does not pick sides or advocate a particular position. Instead, this article portrays how the federal courts are using international law in connection with federal question jurisdiction.

B. United States Treaty Practice: A Summary

1. A Brief Overview

Until the mid-twentieth century, treaties were relatively rare occurrences. The world was made of a few dozen sovereign nations which entered into international agreements to regulate issues of major political importance, such as borders, alliances, shared resources or trade. Some states concluded treaties aiming to set the general tone of their relations, such as treaties of friendship, extradition agreements, and others relating to "peace, national defense, and reciprocal rights to commerce and navigation."[24]

After World War II and the creation of the United Nations, the treaties' scope and the sheer number of signatories per treaty[25] increased significantly.[26] Today, the United States is party to more

24. Van Alstine, *Good Faith*, *supra* note 6, at 1892.

25. *See id.* (noting that today many of the four hundred directly enforceable treaties to which the United States is a party are multilateral).

26. *Id.* at 1892–93 ("[I]n contrast to their modest beginnings, treaties now regulate nearly the full substantive breadth of domestic law, from commercial to criminal law, family to tax law, and even administrative law and civil procedure."). *See generally* Van Alstine, *Age of Treaties*, *supra* note 3, at 917–27; Emil Petrossian, Developments, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1326 (2007); Winston Stromberg, Developments, *Avoiding the Full Court Press: International*

than four hundred treaties dealing with a wide variety of topics.[27] Because of the increasing globalization of economy, trade, and travel, treaties have increasingly been used to regulate areas that traditionally were left to individual states to regulate alone through domestic legislation,[28] such as property and family law.[29] Yet, agreements in these areas necessarily affect private individuals' primary rights[30] and duties.

a. Power to negotiate and ratify treaties

The President of the United States has the exclusive power to negotiate and ratify treaties.[31] Treaties, once ratified, become the "supreme Law of the Land."[32]

Significantly, the Supremacy Clause names treaties in the same textual sentence as the Constitution and federal statutory law.[33] All three types of law are "supreme" over the laws of the several states,[34] and states are expressly forbidden from making their own treaties.[35] Therefore, it has long been held that treaties have the same force as federal statutes,[36] even though their scope can reach beyond Congress' Article I[37] powers.[38] As such, judges are required to give

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Commercial Arbitration and Other Global Alternative Dispute Resolution Processes, 40 LOY. L.A. L. REV. 1337, 1343 (2007).

27. *See generally* Van Alstine, *Age of Treaties*, *supra* note 3, at 917–28 (discussing the variety of subject matters treaties deal with today).

28. *Id.* at 922; Yoo, *Globalism*, *supra* note 18, at 1958 ("International agreements are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action.").

29. *E.g.*, Hague Convention, *supra* note 4 (governing the civil aspects of disputing international parental abductions of children).

30. *See infra* text accompanying note 115. There are three types of treaties. The one described in this article is the type outlined in the Constitution, but it is used infrequently. In contrast, sole executive and congressional executive treaties are utilized more frequently.

31. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have [the] Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

32. *Id.* art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."). *See generally* Van Alstine, *Good Faith*, *supra* note 6, at 1893–94.

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

34. *Id.*

35. *Id.* art. I, § 10, cl. 1.

36. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

37. U.S. CONST. art. I.

effect to treaties,[39] and treaties are included within Article III courts' express jurisdiction.[40] In addition, the President "has the obligation and necessary authority to take care that [these laws] be faithfully executed."[41] This obligation and the federal court's jurisdiction are especially important because treaties are a source of international obligations towards other sovereign states.[42] The United States is in breach of its international obligations if the President fails to enforce the terms of a treaty, or if the U.S. courts' treaty interpretation fails to conform individual behavior to the agreed upon international standard.[43]

b. Treaties become the supreme law of the land

Without a provision in the Articles of Confederation allowing international law to be enforced against the states, the states felt no need to conform their actions to international law's strictures.[44] As a result, the newly emancipated nation's reputation on the international stage suffered.[45] When the Constitution was debated, there was considerable disagreement regarding how to rectify the Articles of Confederation's neglect of treaties.[46]

During the final stages of discussion, the Framers were presented with two options: the "New Jersey" and the "Virginia"

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38. Missouri v. Holland, 252 U.S. 416, 432 (1920); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. c (1987). *Contra* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 451–58 (1998).

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

40. *Id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .").

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. c (citing U.S. CONST. art. II, § 2).

42. Head Money Cases, 112 U.S. 580, 598–99 (1884) (noting that a treaty can be both an agreement between nations, and also benefit individuals who can enforce that agreement).

43. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. a; VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 10:9 (3d ed. 2006).

44. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 698 (1995) [hereinafter Vázquez, *Four Doctrines*]; *see also* Quigley, *supra* note 7, at 554–56 (discussing the history of the Supremacy Clause, including the controversy over the Treaty of Paris which sparked its adoption).

45. However, it does not appear that the United States learned much in the ensuing two hundred years. Louis Henkin notes that the United States' habit of adopting treaties only with reservations, like that it be non-self-executing, "has been described as specious, meretricious, hypocritical." Henkin, *Ghost*, *supra* note 8, at 341.

46. Vázquez, *Four Doctrines*, *supra* note 44, at 698.

plans.[47] The New Jersey Plan contained a version of the Supremacy Clause, and thus entrusted the enforcement of international (and federal) law to the federal courts' judicial review of contrary state law and action.[48] On the other hand, the Virginia Plan entrusted Congress with the power to negate state laws which contradicted or violated the Constitution, federal or international law.[49] The Framers chose the New Jersey Plan.[50] Consequently, "[t]o cure the defects of the Articles of Confederation, the Constitution places treaties on par with other constitutional provisions and federal law in their supremacy over state law."[51]

c. Early treaty jurisprudence

In accordance with the objective of the New Jersey Plan, throughout the nineteenth century courts held that the Supremacy Clause allows treaties to be interpreted as a source of affirmative primary rights.[52] Therefore, if the treaty is a source of an affirmative primary right, it is the court's natural role to enforce that primary right.[53] In addition, treaty provisions are to be interpreted liberally,[54]

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47. *Id.* at 698–99. *Compare id.* at 697–700, *with* Yoo, *Globalism*, *supra* note 18, at 1983–85.

48. Vázquez, *Four Doctrines*, *supra* note 44, at 698–99.

49. *Id.* at 698.

50. *Id.* at 699 (arguing that "[t]he history of the Supremacy Clause thus shows that its purpose was to avert violations of treaties attributable to the United States, and that the Founders sought to accomplish this goal by making treaties enforceable in the courts at the behest of affected individuals without the need for additional legislative action, either state or federal").

51. Yoo, *Globalism*, *supra* note 18, at 1964. However, for purposes of this article, it should be noted that state courts have concurrent jurisdiction over cases invoking treaty-based rights.

52. Quigley, *supra* note 7, at 554–56 (discussing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)). In contrast, Yoo notes that, "[t]o reach this conclusion, [one must] too hastily equate 'Law of the Land' with judicial enforceability. [Instead, b]oth the text of the Supremacy Clause and its history indicate that its primary purpose was to guarantee the primacy of federal law over state law." Yoo, *Globalism*, *supra* note 18, at 1978. In fact, "[n]othing in the [Supremacy] clause, however, indicates that supremacy was to be achieved automatically through the direct enforceability of treaties in federal and state courts." *Id.* at 1979. For a definition of "primary right," see *infra* note 114.

53. Quigley, *supra* note 7, at 555–56; Yoo, *Globalism*, *supra* note 18, at 1980–81. Yoo notes that scholars who believe individuals must be able to enforce treaty rights in court rely on the following additional sources of historical support: first, Alexander Hamilton's statement in the Federalist No. 22; second, William Davie's statement at the North Carolina ratifying convention. *Id.* For example, Hamilton said, "The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." *Id.* (quoting THE FEDERALIST NO. 22 (Alexander Hamilton), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 442 (John P. Kaminski & Gaspare J. Saladino eds., 1986)).

with "good faith"[55] to foreclose friction between the parties to the treaty.[56] Nevertheless, the constitutional and statutory constraints of justiciability still apply.[57]

d. Modern treaty jurisprudence

In the last fifty years there has been a shift in treaty jurisprudence.[58] Scholars have noted that where "good faith" interpretation had been a guidepost for courts throughout the early years of the United States,[59] at some point that liberal interpretative principle died a "silent death."[60] There has been no explanation for the departure from this historical precedent.[61] Scholars argue that this reflects the change in the standing of the United States in the international community since the second World War, and how the U.S. construes its relations with the rest of the international community.[62] In addition, it has been suggested that judges may feel

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Later, Yoo argues that this evidence "might refer to the judicial determination of the scope of individual rights under a treaty . . . but they do not address whether individuals may bring actions immediately upon the entry into force of a treaty or whether an implementing statute is required first." *Id.* at 1981.

54. NANDA & PANSIUS, *supra* note 43, § 10:5.

55. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1987); Van Alstine, *Good Faith*, *supra* note 6, at 1907 & n.161 ("Good faith in this most basic sense is merely a reflection of the proposition that sovereign states must adhere to their international commitments." (citing Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331)).

56. Van Alstine, *Good Faith*, *supra* note 6, at 1908–09 (citing The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 68 (1821) ("[E]mbrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and which this Court could not disregard without betraying its duty.")).

57. *See* Vázquez, *Four Doctrines*, *supra* note 44, at 699–700.

58. *See infra* notes 62–64 (discussing the possible reasons for this shift).

59. Van Alstine, *Good Faith*, *supra* note 6, at 1913–14 ("[I]n nearly a dozen opinions in the first half of the twentieth century, the Court repeatedly emphasized that the subject of the liberal interpretative canon was substantive rights secured by treaties. Indeed, the Court embraced the preference for an expansive interpretation of private rights with respect to treaties ranging from commercial and property rights, to trademark protection, and even to taxation." (citations omitted)).

60. *Id.* at 1914–16 (noting that the last time "good faith" was mentioned in a discussion of treaty interpretation was seventy-five years ago, Factor v. Laubenheimer, 290 U.S. 276, 293 (1933), and that the liberal construction canon has been cited only once in the last forty years, United States v. Stuart, 489 U.S. 353, 368 (1989), receiving a resounding objection from Justice Antonin Scalia); *id.* at 1916 (arguing that present reference to liberal interpretation has "very little in common with its apparent antecedent").

61. *Id.*

62. *See supra* note 22.

hesitant to limit states' rights "over and against the federal government," although that is what the Framers arguably contemplated by adopting the New Jersey Plan and its Supremacy Clause over the Virginia Plan.[63] Finally, and significantly, "[l]aw schools do not focus on the Supremacy Clause's mention of treaties[] in constitutional law courses. When a judge is told by an attorney that the Supremacy Clause requires implementation of a treaty provision, the judge may have no experience from which to assess the argument."[64]

Whatever the reasons for this shift might be, the shift has occurred. Now, courts generally focus on self-execution as the threshold issue to determine whether a treaty-based primary right may be enforced in court.[65] But several different, and distinct, legal issues hide within the concept of self-execution.

2. Self-Execution Analysis: Proper Construction or Sneaky Abstention?

Courts in the United States must enforce the terms of a self-executing treaty.[66] It is binding international and domestic law.[67] On

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63. Quigley, *supra* note 7, at 580.

64. *Id.* In his blog, Roger Alford noted that at a recent event one "thoughtful, erudite" federal appeals court judge confessed he was unaware of the Vienna Convention on the Law of Treaties, a treaty outlining interpretative principles, that, to be fair, the United States has not ratified. Posting of Roger Alford, Treaty Interpretation 101, to Opinio Juris (Oct. 17, 2006), http://www.opiniojuris.org/posts/1160935000.shtml (citing Vienna Convention on the Law of Treaties, May 23, 1969, 115 U.N.T.S. 331). "To be sure, this judge is not to blame for the widespread ignorance regarding the Vienna Convention [on the Law of Treaties]. His ignorance is a by-product of a prevailing ignorance regarding the international rules of treaty interpretation." *Id.* Indeed, "only one Supreme Court majority opinion" and two dissents reference the Vienna Convention. *Id.* (citing Weinberger v. Rossi, 456 U.S. 25, 29 (1982); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting); Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2705 (2006) (Breyer, J., dissenting)).

65. *E.g.*, Jogi v. Voges, 425 F.3d 367, 373 (7th Cir. 2005) (noting that the non-self-execution of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), was a "substantive threshold" to determining whether it created enforceable obligations); Calderon v. Reno, 39 F. Supp. 2d 943, 956 (N.D. Ill. 1998) (correctly considering whether the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. GAOR, 39th Sess., 93d plen. mtg., Supp. No. 51, U.N. Doc. A/RES/39/708 (Dec. 10, 1984), was self-executing before considering whether an individual could enforce its terms in a deportation review proceeding).

66. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation."). *Contra* NANDA & PANSIUS, *supra* note 43, § 10:9 (arguing the presumption in favor of non-self-execution is

the other hand, if a treaty is non-self-executing,[68] Congress must pass implementing legislation before the terms of the treaty become operable as domestic law.[69] In that case, it is the implementing legislation which is enforceable law, not the terms of the treaty itself.[70]

The doctrine of self-execution has come to occupy an important place in the recent scholarly and jurisprudential debate about treaties.[71] Indeed, it has been called a "most confounding" issue in

misplaced). Two examples of self-executing treaties are the Vienna Convention, *see infra* note 215, and the Paris Convention for the Protection of Industrial Property, March 20, 1883, 53 Stat. 1748, 828 U.N.T.S. 307 (amended June 2, 1934).

67. *E.g.*, Hague Convention, *supra* note 4; New York Convention, *supra* note 4.

68. Section 111, subsection 4 of the Third Restatement of the Foreign Relations Law identifies three identifying characteristics of non-self-executing treaties: first, "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation"; second, "if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation"; and third, "if implementing legislation is constitutionally required." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4).

69. *Id.* § 111 cmt. h. *Contra* Vázquez, *Four Doctrines*, *supra* note 44, at 697–700 (arguing that including the Supremacy Clause in the Constitution marked the Framers' intentional departure from British fundamental law, where all treaties were non-self-executing because Parliament had the sole power to enact municipal laws). In addition, "[b]etween 1950 and 1955[,] Senator Bricker of Ohio led a movement to amend the Constitution" so that treaties were, by definition, non-self-executing and could not legislate beyond Congress' Article II authority. Henkin, *Ghost*, *supra* note 8, at 348. Motivated by a desire to prevent desegregation by international treaty, Senator Bricker declared, "My purpose in offering this resolution [the Bricker Amendment] is to bury the so-called Covenant on Human Rights so deep that no one holding high public office will ever dare to attempt its resurrection." *Id.* at 349. While the amendment was not passed, Bricker did achieve his goal: Eisenhower "promised that the United States would not accede to international human rights covenants or conventions." *Id.* at 348–49 (citing *Treaties and Executive Agreements: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong. 825 (1953) (statement of Secretary of State Dulles)). While "[s]uccessive administrations slowly abandoned President Eisenhower's commitment. . . . Senator Bricker's ghost has proved to be alive in the Senate, and successive administrations have become infected with his ideology." *Id.* at 349.

70. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h.

71. *See, e.g.*, Henkin, *supra* note 8, at 348 ("The pattern of non-self-executing declarations threatens to subvert the constitutional treaty system."); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002) (discussing whether attaching non-self-executing declarations to treaties is constitutional); Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263 (2002) (responding to Yoo, *Globalism*, *supra* note 18); Yoo, *Globalism*, *supra* note 18 (arguing that a more comprehensive and systematic review of historical materials proves the Framers intended treaties to require implementing legislation); David N. Cinotti, Note, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277 (2003) (discussing the history of the non-self-execution doctrine and its current impact on treaty-making).

United States treaty interpretation.[72] This is most likely because recent jurisprudence has combined four different issues, each analytically distinct, under the label "self-execution."[73] This article will discuss each of the issues as they should be, distinct from one another: first, whether the treaty was intended to be operable as supreme domestic law without implementing legislation;[74] second, whether the treaty creates judicially enforceable standards;[75] third, whether the treaty purports to accomplish a goal that is within the exclusive law-making powers of Congress;[76] and fourth, whether an individual may enforce the treaty in court.[77] The focus of this article is on this fourth issue, and, more specifically, on how an individual may enforce a treaty-based right in federal court. However, the prior three issues need to be summarily dealt with as a matter of thoroughness.

a. The true self-execution question: Divining intent

According to the Restatement (Third) of the Foreign Relations Law of the United States, where the treaty terms do not expressly state if it is intended to be self-executing, the United States decides

72. United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979).

73. Vázquez, *Four Doctrines*, *supra* note 44, at 710 (arguing that self-execution is simply a question of intent, but that judges have conflated issues of justiciability and constitutionality with it).

74. This is the classic self-execution question, and some argue that its answer depends on the intent of the treaty-makers. *Id.* at 700–10.

75. Vázquez dubbed this the "Justiciability Doctrine." *Id.* at 710–18.

76. This is the "Constitutionality Doctrine." *Id.* at 718–19. According to the Restatement (Third) of the Foreign Relations Law of the United States, "[a]n international agreement cannot take effect as domestic law without implementation by Congress if the agreement would achieve what lies within the exclusive law-making power of Congress . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i (1987). For example, a treaty may be unconstitutional if it attempts to invoke Congress' spending power, make a declaration of war, or raise revenue via taxation. *Id.* This also invokes separation of powers issues as between the legislature and the treaty makers of the Executive Branch. Vázquez, *Four Doctrines*, *supra* note 44, at 718; *see also, e.g.*, Lidas, Inc. v. United States, 238 F.3d 1076, 1080 (9th Cir. 2001) (holding a treaty provision preventing foreign taxpayers from paying double income tax in France and the United States unconstitutional because it infringed on Congress' exclusive powers).

77. This is the "Private Right of Action Doctrine." Vázquez, *Four Doctrines*, *supra* note 44, at 718–22. Indeed, another scholar noted, "[s]ome courts . . . have erroneously defined self-executing treaties to include only those that create affirmative private rights of action." Van Alstine, *Age of Treaties*, *supra* note 3, at 919 (citing Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004)). *But see, e.g.*, *id.* at 919 n.156 (citing Int'l Café, S.A.L. v. Hard Rock Café Int'l (U.S.A.), Inc., 252 F.3d 1274, 1277 n.5 (11th Cir. 2001) (per curiam)); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h.

"how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing . . . ."[78] However, the Restatement does not definitely declare whose intent counts:[79] that of the parties to the treaty, or one of the "treaty-makers" of the United States? If the parties to the treaty intend the treaty to be self-executing, independent of implementing legislation, there is a real risk of international friction if the United States declares differently after agreeing to the treaty's terms.[80] On the other hand, if the parties to the treaty intend that the treaty, or a particular provision of it, be non-self-executing, then the threat of international friction is abated.[81] Each party is "on notice" that the treaty must be implemented by each parties' legislative organizations before becoming effective domestic law.[82]

The President and, by delegation, the United States State Department, are generally considered the "treaty-makers" of the United States. They negotiate the treaty terms before sending the treaty to the Senate for its "advice and consent" to ratification.[83] However, in its "advice and consent" role, the Senate may change how the treaty is enforced domestically.[84] For example, in 1992 the United States Senate Committee on Foreign Relations expressed

78. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h; *see also* Yoo, *Globalism*, *supra* note 18, at 1972 ("Such efforts [to divine intent] seem to indicate that courts are attempting to incorporate treaties into their conceptual frameworks for deciding constitutional and statutory questions. This is nowhere more clear than in the current refinement of the intent-based approach into a private cause-of-action analysis."). *Contra* NANDA & PANSIUS, *supra* note 43, § 10:9, 10-57 (arguing that it is "somewhat inappropriate" for the Restatement to accept a presumption of non-self-execution where the intent of the United States regarding that issues is "unclear"); Vázquez, *Four Doctrines*, *supra* note 44, at 707–08 (arguing that this practice is "in some tension with the text and apparent purposes of the Supremacy Clause").

79. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 n.2; NANDA & PANSIUS, *supra* note 43, § 10:5.

80. Vázquez, *Four Doctrines*, *supra* note 44, at 706.

81. *Id.*

82. *Id.*

83. For a treaty to be enforceable domestic law, two-thirds of the Senate must "consent" to the treaty. NANDA & PANSIUS, *supra* note 43, § 10:4, 10-20. As Nanda notes, "We often refer to this consent as Senate 'ratification' of the treaty. Technically, however, the Senate advises and consents and upon the required consent the President ratifies the treaty." *Id.* However, "[i]n an international sense," Senate consent is not required for a treaty to be binding international law. *Id.* at 21.

84. Auguste v. Ridge, 395 F.3d 123, 141–42 (3d Cir. 2005); NANDA & PANSIUS, *supra* note 43, § 10:4, 10-23 n.23.

their "advice and consent" to the International Covenant on Civil and Political Rights ("ICCPR") "subject to the following declarations: (1) That the United States declares that the provisions . . . [of the ICCPR] are not self-executing."[85]

As such, "[l]ower courts in recent years, however, have sought to discern the intent not of the parties to the treaty, but of the U.S. negotiators of the treaty, the President in transmitting it to the Senate for its advice and consent, and the Senate in giving its advice and consent."[86] By doing so, the courts analyze the treaty's negotiations and statements made during and after the ratification process.[87]

In some instances, this extra-textual analysis overcomes the treaty's plain language.[88] This interpretative method directly contradicts the Vienna Convention on the Law of Treaties.[89] That agreement, while not ratified by the United States, is still considered to be a binding restatement of customary international law.[90] It directs courts to look at the plain language of the treaty before divining intent to determine whether a particular provision is self-executing.[91] That is, courts are to look for language in the treaty indicating it was intended to be unenforceable without implementing legislation.[92]

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85. S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 102-23, at 23 (1992), *reprinted in* 31 I.L.M. 645, 659.

86. Vázquez, *Four Doctrines*, *supra* note 44, at 705.

87. *Id.* at 705 n.47 (citing, among others, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 376 (7th Cir. 1985)); Yoo, *Globalism*, *supra* note 18, at 1972.

88. Vázquez, *Four Doctrines*, *supra* note 44, at 705 n.47 (citing various cases where this has been done as a matter of course).

89. Vienna Convention on the Law of Treaties, May 23, 1979, 1155 U.N.T.S. 331 [hereinafter VCLT]. This treaty has not been ratified by the United States, however. *See infra* note 90 and accompanying text.

90. Robert E. Dalton, *National Treaty Law and Practice: United States*, *in* 2 NATIONAL TREATY LAW AND PRACTICE: AUSTRIA, CHILE, COLOMBIA, JAPAN, THE NETHERLANDS, UNITED STATES 240, 240 n.2 (Monroe Leigh, Merritt R. Blakeslee & L. Benjamin Ederington eds. 1999) ("Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.").

91. VCLT, *supra* note 89, art. 2(1)(a), 1155 U.N.T.S. at 333.

92. Jogi v. Voges, 425 F.3d 367, 377 (7th Cir. 2005) (citing *Frolova*, 761 F.2d at 373) ("As we noted [in *Frolova*], if the parties' intent is clear from the treaty's language, courts will not inquire into the remaining factors."); NANDA & PANSIUS, *supra* note 43, § 10:9 (making arguments in favor of presuming treaties to be self-executing). *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d (1987) (seemingly adopting as valid the unilateral reliance on Senate qualifications when determining whether a treaty is self-executing).

It is preferable for a treaty to be self-executing because it lowers the risk of involuntary breach.[93] In fact, reporter's note 5 of the Restatement (Third) of the Foreign Relations Law of the United States notes, "if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts."[94]

Instead, recent jurisprudence presumes treaties are non-self-executing, then searches for intent that the treaty create enforceable standards without implementing legislation.[95] Scholars who believe the Supremacy Clause was adopted to shift the United States away from the British system, where treaties could not be self-executing because only Parliament has the ability to create municipal law, believe the courts' search for intent before textual analysis is misguided.[96]

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93. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 n.5; NANDA & PANSIUS, *supra* note 43, § 10:9, 10-58 ("If the agreement is presented [by the President] as a treaty, . . . further interpretation of its 'possible' self-executing character frustrates the international process. To further impose the need for a self-executing finding permits the branches of government to put their heads in the sand and ignore their international promises.").

94. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 n.5; NANDA & PANSIUS, *supra* note 43, § 10:9, 10-62 (noting that while "[t]he Restatement works within the existing legal framework[,] . . . the Restatement's approach is too passive"); Vázquez, *Four Doctrines*, *supra* note 44, at 705 (voicing concern that the lower courts have reversed the presumption in favor of non-self-execution).

95. *E.g.*, Cantor v. Cohen, 442 F.3d 196, 207 n.1, 208 (4th Cir. 2006) (Traxler, J., dissenting) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4)(a)); United States v. Emuegbunam, 2001 FED. App. 0358P at 10 (6th Cir. 2001) ("[C]ourts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them."); United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000) (en banc).

> [A] few courts have looked not for an intent to alter the rule that treaties do not generally require legislative implementation to be enforceable by the courts of this country, but for an intent that the treaty be enforceable in the courts, and, in the absence of evidence of such an intent, they have held that the relevant treaty is not 'self-executing' and thus not enforceable by the courts of this country.

Vázquez, *Four Doctrines*, *supra* note 44, at 705. See *id.* at 705 n.47 for a more exhaustive list of cases where this has been done. *Contra* Igartua-De La Rosa v. United States, 417 F.3d 145, 189 (1st Cir. 2005) ("Given this constitutional and judicial history, a court ought not quickly conclude that treaties are non-self-executing. Rather, a court must conduct an independent and searching inquiry into the treaty's purpose." (citation omitted)).

96. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 202 (2d ed. 1996) (arguing that this practice of divining intent has been "accepted without significant discussion, is 'anti-Constitutional' in spirit and highly problematic as a matter of law" because it "runs counter to the language, and spirit, and history of the Constitution"); NANDA &

Regardless of which approach ultimately wins the day by declaration or default, the intent of the parties to the treaty and the President, the Senate, and the Executive Branch are relevant when determining whether a treaty is enforceable without implementing legislation.[97] However, questions about whether and how the treaty should be able to be invoked in court should be answered separately.[98]

b. Changing the analysis: Conflating justiciability issues with self-execution

Some of the confusion surrounding enforcing treaties in court is due to the lack of clear, definite boundaries between analytical issues. Courts conflate valid questions of justiciability with the rubric of self-execution.[99] As stated above, self-execution is a matter of determining whether the treaty-makers intended to implement a treaty with legislation before making it enforceable domestically.[100] On the other hand, a court properly considers whether the case before it is justiciable when it asks the following types of questions: would ruling on the case interfere with separation of powers? Are the right parties before the court? Do the parties have a case or controversy? Has the applicable law created judicially manageable standards by

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PANSIUS, *supra* note 43, § 10:9, 10-64 (arguing to remove any "presumption" in favor of a straightforward principle—"a treaty is self-executing absent express provision to the contrary"); Vázquez, *Four Doctrines*, *supra* note 44, at 706. *But see* Yoo, *Globalism*, *supra* note 18, at 1961 (arguing that the "[i]nternationalists [as he calls Vázquez and his followers] have neglected both to review the Framing-era sources carefully enough and to utilize a systematic methodology").

97. *See* Neal Kumar Katyal, Comment, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 112 (2006) (arguing that the Supreme Court considered, then rejected, the Executive Branch's interpretation of the Geneva Conventions, thus indicating that the Court has the power to require more formal determinations of a treaty's meaning before deferring to the President's "short-term, politically motivated decisions that do not redound to the long-term interests of America").

98. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h; *see also Li*, 206 F.3d at 68 (Sleya, J. and Boudin, J., concurring) (adopting the Restatement's position).

99. Vázquez, *Four Doctrines*, *supra* note 44, at 711 ("A review of the decisions that ascribe independent significance to factors other than intent shows that these courts have examined under the 'self-execution' rubric various concepts that are not unique to treaties. These include matters such as whether the claim is justiciable, whether the litigant has standing, and whether the litigant has a right of action. Rather than examine these issues separately as they (generally) do in constitutional and statutory cases, courts confronted with treaties have rolled all of these issues into a single 'self-execution' question.").

100. *See supra* Part B.2.a.

which the court can accurately assess the parties' behavior?[101] Answering these questions allows the court to determine if it has the power to hear that particular case. For example, while it is accurate to conclude that if a treaty does not dictate judicially enforceable standards, courts cannot enforce its terms as domestic law,[102] it is inaccurate to make the next theoretical leap: that the treaty is non-self-executing. Clearly, issues relating to justiciability are different than whether the treaty is self-executing. Even so, courts often conflate these issues.[103]

It is especially important that the court clearly distinguish between the two issues, self-execution and justiciability, because a determination that a particular treaty provision is nonjusticiable will affect all other treaty provisions similar to it.[104] On the other hand, if a court determines that a particular treaty provision is non-self-executing and therefore unenforceable in a court of law, that determination will not affect other similar treaty provisions because the intent assessment is made on a case-by-case basis.[105]

C. Introduction to Treaty Provisions Which Benefit Individuals

Traditionally, treaties were considered contracts between nations,[106] dealing with foreign relations issues, and enforceable only by other signatory nations. This seemed proper and logical given the national character of the agreements.

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101. *See* Flores v. S. Peru Copper Corp., 343 F.3d 140, 158 (2d Cir. 2003) ("[A]s a practical matter, it is impossible for courts to discern or apply in any rigorous, systematic, or legal manner international pronouncements that promote amorphous, general principles." (citing Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999))). For examples where this question has been answered in the negative, see Vázquez, *Four Doctrines*, *supra* note 44, at 713–14 nn.81–85 (citing several cases where courts have declined to enforce treaty provisions because it was "too vague for judicial enforcement" or failed to "provide[] specific standards").

102. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989); Baker v. Carr, 369 U.S. 186, 217 (1962).

103. United States v. Kun Yun Jho, 465 F. Supp. 2d 618, 632 (E.D. Tex. 2006) (noting that the district court did not decide whether the United Nations Convention on the Law of the Sea ("UNCLOS") was self-executing because it "found no specific right of private action in UNCLOS that would provide an individual litigant redress under UNCLOS"); Stutts v. De Dietrich Group, No. 03-CV-4058 (ILG), 2006 WL 1867060, at *6 (E.D.N.Y. June 30, 2006) (defining "self-executing" as where "a private right of action is explicitly provided for in the treaty or the treaty has been implemented by a U.S. federal statute").

104. Vázquez, *Four Doctrines*, *supra* note 44, at 717 n.102.

105. *Id.*

106. Van Alstine, *Age of Treaties*, *supra* note 3, at 904.

Now, however, treaties are being used to govern individuals and previously domestic issues.[107] Indeed, some provisions of recent treaties have been written in such a way as to arguably confer a primary right upon an individual.[108] For example, the Hague Convention governs international child abductions and the Vienna Convention governs when foreign detainees must be informed of their right to contact their consulate. Accordingly, treaties will be increasingly litigated by individuals seeking to enforce their terms against other private individuals and against state officials.

There are four distinct issues which one must address when pleading a case: first, whether the treaty bestows upon the plaintiff a primary right;[109] second, whether the treaty itself contains a secondary right, or right of action;[110] alternatively, whether the treaty-based primary right may be enforced by another right of action;[111] third, whether the treaty or other federal law provides a remedy;[112] and fourth, whether federal court is the proper place to adjudicate this claim.[113]

1. Interpretation of Primary Rights: Using the Standing Doctrine

The first issue is whether the plaintiff has a right to be treated in a certain fashion by the defendant. This is often qualified in terms of a "primary right" or "standing."[114] "Primary rules in municipal legal systems are those under which 'human beings are required to do or abstain from certain actions, whether they wish to or not.'"[115]

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107. *See supra* notes 2–4, 26–28 for examples of these types of treaties.

108. *See infra* Parts D.2.a.i.A, D.2.a.ii.A, D.2.b.ii.A.

109. *See infra* Part C.1. For a definition of "primary right," see *infra* text accompanying note 115.

110. *See infra* Part C.2.

111. *See id.*

112. *See infra* Part C.3.

113. *See infra* Part D.

114. Traditionally, an individual plaintiff has standing when the constitutional provision or statute was "intended to benefit" the individual plaintiff. Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1135–36 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882–83 (1990)) (arguing that the question of whether an individual plaintiff has a primary right under a treaty and whether an individual has standing "in fact address the same issue and should be collapsed"). This argument was cited with approval in *Standt v. New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

115. Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1089 (quoting H.L.A. HART, THE CONCEPT OF LAW 78–79 (1961)).

Simply, a litigant has standing if under the law they have a primary right to be treated in a certain fashion and the defendant is alleged to have breached that primary right.[116]

Some treaties set forth aspirations, rather than obligations.[117] Since by their terms they are not attempting to bind the parties to a particular set of obligations, there is no obligatory standard which can be breached. Therefore, the courts cannot enforce these terms.[118]

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116. *Lujan*, 497 U.S. at 883; Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1135–37 (noting that because constitutional and statutory standing doctrines are relatively recent legal developments "it is not surprising that these decisions do not connect the issues of primary rights and standing").

117. The following international agreements are often cited as aspirational, rather than obligatory: Universal Declaration of Human Rights art. 25, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Economic, Social, and Cultural Rights, art. 12, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360; Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 14, 1992, Principle 1, 31 I.L.M. 874. In addition, until recently, so-called "common article 3" of the Geneva Conventions was considered non-self-executing, and therefore beyond the scope of judicial enforcement. Then, the Supreme Court decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), and determined that Article 21 of the Uniform Code of Military Justice, whose authority relied upon the law of war, "executed" the prisoners' rights created by common article 3. *Id.* at 2793–95. Accordingly, common article 3, at least, was judicially enforceable. Marcia Coyle, *"*Hamdan*" Links U.S., International Law: Reach of Ruling Already in Dispute*, NAT'L L.J., July 3, 2006, at 1; *see also* David Scheffer, Hamdan v. Rumsfeld*: The Supreme Court Affirms International Law*, JURIST, June 30, 2006, http://jurist.law.pitt.edu/forumy/2006/06/hamdan-v-rumsfeld-supreme-court.php. At least as significantly, Justice Stevens, writing for the majority, held that the principles embodied in common article 3 applied to armed conflicts even if the not all the participants were signatories to the Geneva Conventions. *Hamdan*, 126 S. Ct. at 2795–96; *see also* Post of Kenneth Anderson, Hamdan, the Geneva Conventions, and Common Article 3, to Kenneth Anderson's Law of War and Just War Theory Blog (July 12, 2006, 10:09 EST), http://kennethandersonlawofwar.blogspot.com/2006/07/hamdan-geneva-conventions-and-common.html (arguing that the Court's decision on this point means that common article 3 will be the *only* Geneva Convention protection embodied applicable to detainees in the War on Terror). In response to the Court's unprecedented "power grab" in *Hamdan*, President Bush proposed a series of bills in an attempt to gain Congress' consent to create the military commissions the Court had just invalidated as unconstitutional. John Yoo, *Sending a Message: Congress to Courts: "Get Out of the War on Terror,"* OPINIONJOURNAL, Oct. 19, 2006, http://www.opinionjournal.com/editorial/feature.html?id=110009113. On September 29, 2006, Congress passed Senate Bill 3930, a compromise bill. *See generally* Michael C. Dorf, *Why the Military Commissions Act is No Moderate Compromise*, FINDLAW, Oct. 11, 2006, http://writ.news.findlaw.com/dorf/20061011.html; Aziz Huq, *How The Military Commissions Act of 2006 Threatens Judicial Independence: Attempting to Keep the Courts Out of the Business of Geneva Conventions Enforcement*, FINDLAW, Sept. 26, 2006, http://writ.news.findlaw.com/commentary/20060926_huq.html. President Bush signed the MCA into law on October 17, 2006. George W. Bush, President of the United States, Address at the Military Commissions Act Signing Ceremony (Oct. 17, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.

118. One reason for this might lie within the separation of powers realm. Asking a court to enforce what amount to political aspirations would intrude on the legislative branch's mandate to create the rules by which society must live. Vázquez, *Four Doctrines*, *supra* note 44, at 718.

Indeed, if a litigant used one of these treaties as the basis of his or her claim, he or she would lose on the merits.[119]

Furthermore, a treaty that establishes a primary right benefiting an individual may be enforced by the individual if there is a secondary right: a right of action which allows that individual to initiate a judicial proceeding on his behalf.[120] There is a definite difference between determining that a treaty provision benefits an individual thereby conferring a primary right, as is required by the constitutional doctrine of standing,[121] and determining that the benefited individual may initiate a judicial proceeding to enforce that primary right against the entity that breached it.[122]

2. Interpretation of Secondary Rights: Preventing Enforcement of Treaty-Based Rights by Finding No Treaty-Based Private Cause of Action

The second issue is whether the plaintiff may initiate a judicial proceeding to enforce his or her primary right *vis a vis* the defendant. This issue may be qualified as whether your client has a "secondary right,"[123] a "private cause of action," or a "private right of action."[124]

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119. *Id.* at 712.

120. But beware of generalized grievances. *See* Alexander v. Sandoval, 532 U.S. 275, 289–91 (2001) (holding that plaintiff had no standing to enforce disparate impact discrimination). In addition, some treaty provisions are intended to benefit only state actors, not individuals. For example, it is very unlikely that an individual could enforce the terms of a disarmament treaty, Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1140 (citing Allen v. Wright, 468 U.S. 737, 753–56 (1984)), or land grant treaties which protect all property rights, 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3563 n.46 (2d ed. 1984) (citing Crystal Springs Land & Water Co. v. City of Los Angeles, 76 F. 148 (C.C.D. Cal. 1896)). In addition, beware of forum non conveniens when dealing with foreign litigants adjudicating disputes arising in foreign jurisdictions. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987).

121. Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1134–36, 1141.

122. *Id.* at 1141 n.242. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court distinguished the concepts as follows:

> [*S*]*tanding* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available.

Id. at 239.

123. "A secondary or remedial right is . . . a right to obtain a remedy or sanction upon the violation of a primary right . . . ." Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1089–90 (citing Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 515–16 (1924)).

Generally, it is easy to conflate whether a constitution, treaty, or statute contains a private primary right with whether it bestows secondary rights (i.e., rights of action) for the simple reason that most courts talk about "rights" rather indefinitely, without clarifying adjectives.[125] In fact, primary rights and secondary rights are two very different "legal animals."[126]

While courts generally find that treaties bestow primary rights on individuals, at the same time they prevent those rights from being enforced by determining that those individuals have no treaty-based right of action.[127] Accordingly, although a treaty benefits individuals, that individual may not be able to enforce that treaty's obligation in court.[128] On the other hand, the individual who wishes to invoke a treaty right defensively does not need a private right of action, only a primary right.[129]

However, treaty-based primary rights are enforceable using existing federally created causes of action. Consequently, the claims can be adjudicated in federal court because the causes of action are

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124. For purposes of this paper, I will use the phrases "private cause of action" and "private right of action" interchangeably.

125. *See id.* at 1087–88 (arguing that the use of the general term "right" when stating that individuals do or do not have "rights" under international law is "susceptible" to both interpretations—as primary rights or secondary rights).

126. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 153 (tent. ed. 1958) (calling a secondary, or remedial, right of action a "very different legal animal" than a primary right).

127. Oftentimes, the courts determine a treaty is unenforceable because the terms neither contain nor create a private right of action, qualifying the treaty as "non-self-executing." As discussed *supra* text accompanying notes 125–126, this characterization is not technically accurate.

128. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 n.4 (1987).

129. Quigley, *supra* note 7, at 577; Van Alstine, *Age of Treaties*, *supra* note 3, at 918 (citing Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts—Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1448–63 (1996)). However, the well-pleaded complaint rule, Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987), will prevent cases which cite treaty-based rights defensively from getting into federal court. *See* Quigley, *supra* note 7, at 577. On the other hand, some treaties' implementing legislation has explicitly abrogated the well-pleaded complaint rule. Banco de Santander Cent. Hispano v. Consalvi Int'l Inc., 425 F. Supp. 2d 421, 427 (S.D.N.Y. 2006) (citing *Caterpillar*, 482 U.S. at 392) (discussing the differences between 28 U.S.C. § 1441 (2006) and 9 U.S.C. § 205 (1970), one of the implementing provisions of the New York Convention, *supra* note 4). For a more detailed discussion of this difference, see *infra* D.2.b.ii.D.

federally created and general federal question jurisdiction exists pursuant to 28 U.S.C. § 1331.[130]

Depending on the parties, it may be fairly straightforward to plead a case in federal court, even when alleging a violation of a treaty-based right. Leaving aside the interpretative issue of whether a secondary right exists from the terms of the treaty, the following outlines the straightforward avenues into federal court. All of these turn on who the plaintiff or defendant is and assume the existence of a treaty-based primary right.[131]

a. Suing federal and state officials for violating treaty-based rights

If the treaty itself creates a primary right so that the plaintiff has standing, the plaintiff may sue a state or federal domestic official using 42 U.S.C. § 1983,[132] or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[133] respectively, as the federally created rights of action.[134] In addition, the plaintiff may sue a federal agency for breaching her primary right using the provisions of the APA.[135] Accordingly, when the plaintiff can allege within the confines of her well-pleaded complaint that her treaty-based right has been violated by a state or federal official,[136] the plaintiff may file her

130. *See infra* Part C.2.a.

131. Other threshold questions include: whether the parties' countries of origin have ratified the treaty; whether the treaty is self-executing, *see supra* Part B.2, and if not self-executing, whether the treaty has been implemented. *Id.*

132. 42 U.S.C. § 1983 (2000); Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (citing Blessing v. Freestone, 520 U.S. 329, 340 (1997)).

133. 403 U.S. 388 (1971) (implying a private right of action to enforce the Fifth Amendment).

134. Both are valid options, although § 1983 is an express private right of action, whereas *Bivens* implied a private right of action in the Fifth Amendment.

135. 5 U.S.C. § 702 (1988) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *see, e.g.*, Sohappy v. Hodel, 911 F.2d 1312, 1316–17 (9th Cir. 1990); Flynn v. Shultz, 748 F.2d 1186, 1191–94 (7th Cir. 1984); Vázquez, *Treaty-Based Rights*, *supra* note 1, 1143–54 ("In short, in suits against state and federal officials, a right of action is afforded by section 1983 and the APA, respectively, to any person holding a primary right under a treaty unless either a treaty or a statute makes other procedures exclusive or affirmatively precludes review.").

136. *See, e.g.*, Romero v. Kitsap County, 931 F.2d 624, 626 (9th Cir. 1991); *Standt*, 153 F. Supp. 2d at 427–30 (finding that Article 36 of the VCCR creates a primary right which an alien could enforce against city and state police officers using 28 U.S.C. § 1983 or 28 U.S.C. § 1350); Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1272 & n.28 (1991). If the litigant wishes to sue a foreign official or government, sovereign immunity and the act of state doctrine must be overcome. These issues

case in federal court under the express terms of Article III of the United States Constitution[137] and the implementing statute of that provision, 28 U.S.C. § 1331.[138]

b. Suing corporations or private individuals for violating treaty-based rights

If the plaintiff's treaty-based rights have been violated by a private individual, the federal causes of action found in 42 U.S.C. § 1983, *Bivens*, the Administrative Procedure Act ("APA"), and the Foreign Sovereign Immunities Act of 1976 ("FSIA") are unavailable.[139] In that case, the plaintiff should first argue the treaty itself contains a private right of action. Unfortunately, however, treaties rarely contain express rights of action. As such, this trail focuses on the issue of how private rights of action are implied from the express terms of treaties,[140] using the analysis usually applied to statutory-based implied causes of action.[141]

The Supreme Court is less willing to imply a right of action from a federal statute because it is a violation of separation of powers.[142] Until 1975, when the Supreme Court decided *Cort v.*

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are beyond the scope of this article. See generally *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (1989), which considered the exceptions to foreign sovereign immunity created under Foreign Sovereign Immunities Act ("FSIA"), *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983), where the Supreme Court concluded the FSIA was a comprehensive federal scheme governing foreign sovereign immunity, and so it was proper to allow FSIA suits based wholly on common law causes of action into federal court, and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which considered the limits of the act of state doctrine.

137. U.S. CONST. art. III, § 2(1) ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .").

138. 28 U.S.C. § 1331 (1875) (amended 1980) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

139. *See supra* Part C.2.a.

140. Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1155 ("If . . . no common-law action is available, it is necessary to consider whether a right of action is nevertheless implicit in the treaty.").

141. Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1114 ("The rules specifying whether and when constitutional and statutory adjudication is appropriate, and at whose behest, are no less applicable to treaty adjudication."). Even so, it is not clear that the same modes of analysis should be used to interpret statutes and treaties. *See* Van Alstine, *Good Faith*, *supra* note 6, at 1923 ("In sharp contrast to statutes . . . the application of treaties involves interpreting the obligations owed to a sovereign entity that is external to our national polity.").

142. Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979); Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1155.

Ash,[143] courts generally implied a right of action if a statute conferred a primary right and there was no indication of legislative intent to make other enforcement mechanisms exclusive.[144] Now, however, the focus has shifted to whether Congress affirmatively intended a private right of action to exist.[145] Moreover, "[a]lthough the Court has not, since *Cort*, addressed the proper test for implying rights of action from treaties, several factors militate in favor of employing a third approach, more closely resembling the approach the Court applies today with respect to constitutional claims,"[146] because "treaties resemble the Constitution far more closely than statutes."[147]

However, one scholar argues that courts should nonetheless apply a less restrictive analysis to treaties, one more akin to how the Court has interpreted constitutional provisions.[148] According to this argument, courts should not presume that their provisions were intended to be enforced elsewhere because treaties have more complicated and less accessible enforcement mechanisms, as evidenced by the length of this article.[149] Now, however, similar to the change in statutory analysis, the focus has shifted to whether the treaty makers (the President and Senate) intended the treaty to be enforced by individuals in court.[150]

The particular issue of whether a treaty can be interpreted to contain an implied private right of action has had special significance since *Merrell Dow Pharmaceuticals Inc. v. Thompson*.[151] While there was considerable disagreement among the federal circuits[152] as to whether the lack of a federal private right of action doomed a

143. 422 U.S. 66 (1975).

144. *See Touche Ross & Co.*, 442 U.S. at 578; Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1155. In addition, these comprehensive statutory schemes usually provide alternative enforcement mechanisms, like administrative review.

145. *Touche Ross & Co.*, 442 U.S. at 578.

146. Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1155–56.

147. *Id.* at 1156. *Contra* Van Alstine, *Good Faith*, *supra* note 6, at 1923.

148. Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1155 ("With respect to constitutional claims, however, the Court has adhered to its comparatively hospitable, pre-*Cort* approach to implying rights of action.").

149. *Id.* at 1156 ("[T]he Court's continuing hospitable approach to implying rights of action under the Constitution is based in part on the intent of the Framers to make the courts the primary enforcers of constitutional rights. . . . [T]he Framers had a similar intent with respect to treaties." (citations omitted)).

150. *See supra* notes 16–19.

151. 478 U.S. 804 (1986).

152. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 311–12 (2005).

litigant's attempt to adjudicate a state law cause of action in federal court after *Merrell Dow*,[153] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*[154] has resolved this issue somewhat. In the latter case, the Supreme Court held that the lack of a private right of action is "relevant to, but not dispositive" of Congress' intent as to whether a state law claim supported by a particular federal law was to be allowed into federal court.[155] Therefore, a lack of a federally created private right of action does not torpedo a litigant's attempt to plead a state law created cause of action in federal court.[156] In fact, *Grable* reaffirmed the true test: "[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[157]

If the litigant is able to show that the treaty itself contains an implied right of action, then federal subject matter jurisdiction is appropriate, again, because of the express language of Article III and 28 U.S.C. § 1331.[158] In addition, if it is an alien who is asserting the claim, and the violation amounts to a tort, then 28 U.S.C. § 1350, the Alien Tort Statute ("ATS"), applies and federal subject matter jurisdiction is appropriate.[159]

But, where the treaty provides a primary right, with no corresponding implied secondary right, the litigant may still try to follow a faint trail into federal court. Treaty rights have a long history of being incorporated into common law causes of action.[160] However, these common law rights of action are normally adjudicated by state courts.[161] But where the plaintiff would be best

153. 478 U.S. 804 (1986).

154. 545 U.S. at 308.

155. *Id.* at 318.

156. *Id.*

157. *Id.* at 314.

158. *See supra* notes 137–38.

159. 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

160. Henkin, *Ghost*, *supra* note 8, at 347 n.29 ("[C]ourts can enforce self-executing human rights provisions by injunction and commonly also by common law remedies."); Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1143.

161. Language like this certainly did not help give the lower federal courts clear guidance on which claims were and were not to be adjudicated in federal courts: "Given the significance of the

served by adjudicating his or her case in federal court,[162] the plaintiff will have to argue that the face of his or her well-pleaded complaint contains a disputed, substantial, and essential federal issue: the construction of the treaty-based right.[163] This theory is discussed in more detail in Part IV(B)(2)(a), *infra*.

3. Remedies for Treaty Violations

Third, the plaintiff must be entitled to a judicial remedy under the law which can redress his or her injury. When determining if a treaty creates a right of action, courts often consider whether the treaty clearly elucidates a remedy for violation of the alleged right.[164] Moreover, this inquiry is an appropriate one for courts to make given that a remedy is required for Article III standing to exist.[165]

However, this issue is easily conflated with whether your client has a private right of action to enforce her primary right because of the well-known adage, "that every right . . . must have a remedy."[166]

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assumed congressional determination to preclude federal private remedies [for violating the Federal Food, Drug, and Cosmetic Act], the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 814 (1986).

162. One scholar has argued that plaintiffs in human rights and environmental litigation against multinational corporations may not be better off in federal court. Rosencranz & Campbell, *supra* note 7, at 205–06. State standing requirements are less strict than federal because state courts are not limited to Article III cases and controversies. *Id.* at 190. Therefore, litigants may not have to have the injured parties personally participate throughout the trial. *Id.* at 190–91. In addition, state courts do not have to consider the following two doctrines which give federal judges "convenient rationales for dismissing the case[s]": first, the act of state doctrine, which "generally precludes review by United States courts of official acts by foreign states," *id.* at 197 (citing Kirkpatrick & Co., Inc. v. Envt'l Tectonics Corp. Int'l, 493 U.S. 400, 405 (1990)), and second, comity, a principle which discourages one state from punishing conduct with the intent of changing behavior in another state. *Id.* at 179 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 (1996)). Finally, the federal forum non conveniens factors elucidated in *Piper Aircraft v. Reyno*, 454 U.S. 235, 254 n.22 (1981) also create a formidable barrier for a foreign litigant suing for an injury sustained in a foreign jurisdiction. *Id.* at 179–87. However, some states have legislatively adopted the *Piper* standards "to avoid being flooded by 'foreign litigation.'" *Id.* at 188.

163. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2. As such, the Supremacy Clause places treaties and federal statutory law on essentially the same foundation. Van Alstine, *Good Faith*, *supra* note 14, at 1893.

164. *E.g.*, Jogi v. Voges, 425 F.3d 367, 384–85 (7th Cir. 2005); *see also infra* notes 211–12 and accompanying text.

165. Davis v. Passman, 442 U.S. 228, 239 n.18 (1979).

166. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803); *see also* Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1090 (noting that the traditional view that international law does not provide "rights" to individuals "reflects the sanctionist view of law, under which the existence

While some courts do discuss these issues in the same breath, for clarity it is important to maintain analytical distinctions between the two ideas. Moreover, as the United States Supreme Court stated in *Davis v. Passman*, "[a] plaintiff may have a cause of action even through he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the 'preconditions' for such equitable remedies."[167]

For further discussion of remedies available under particular treaties, see *infra* Parts IV(B)(1)(a)(iii), IV(B)(1)(b)(iii) and IV(B)(2)(b)(iii).

D. Subject Matter Jurisdiction

Finally, the fourth issue is that the plaintiff must plead his or her case in the proper court—the court which has the expertise and ability to adjudicate his or her case. This is the issue of subject matter jurisdiction.

Article III courts are courts of limited jurisdiction,[168] and determining whether a particular claim may be adjudicated in federal court is a question which has confused legal scholars and law students since the seminal case, *Osborn v. Bank of the United States*.[169] On the other hand, state courts retain the right to adjudicate all claims which federal courts may not. Consequently, if the federal court dismisses your client's claim for lack of subject matter jurisdiction,[170] the remedy is simply to file the claim in the appropriate state court.[171] However, there are real practical reasons for wanting to adjudicate one's case in federal court.[172] For example,

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of a right turns on the power of the right-holder to set in motion on his own behalf the machinery of the legal system for enforcing obligations and sanctioning departures from them"). *Contra id.* at 1091 (citing HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 27–29 (1973)). One example of a court that has seemed to collapse the two issues, right of action and remedy, is *Standt v. City of New York*, 153 F. Supp. 2d 417, 422 (S.D.N.Y. 2001).

167. 442 U.S. at 239 n.18 (citing Trainor v. Hernandez, 431 U.S. 434, 440–43 (1977)).

168. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.")

169. 22 U.S. (9 Wheat.) 738 (1824).

170. FED. R. CIV. P. 12(b)(1).

171. Barring, of course, any statute of limitations problems.

172. The "[p]rincipal purpose of the grant of original federal question jurisdiction is to afford plaintiffs a sympathetic and knowledgeable forum for the vindication of their federal rights." 13B WRIGHT, MILLER & COOPER, *supra* note 120, § 3561 n.5 (citing Hunter v. United Van Lines, 746 F.2d 635 (9th Cir. 1984)). *But see supra* note 162.

federal courts may be more likely to interpret federal law uniformly and correctly because of their experience with that body of law.[173] In addition, it was traditionally feared that state courts would be more hostile to the adjudication of federal interests.[174]

1. Article III

According to Article III of the U.S. Constitution, "[t]he judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, *and Treaties made, or which shall be made*, under their Authority."[175] Clearly, the interpretation of treaties is a matter for the federal courts. However, like a self-executing treaty, this constitutional provision was not implemented until 1875, when Congress enacted 28 U.S.C. § 1331.[176] Moreover, constitutional subject matter jurisdiction, which derives its authorization from Article III, has always been interpreted much more broadly than statutory subject matter jurisdiction, which derives its authority from § 1331.[177]

According to Wright, Miller and Cooper, "The most difficult single problem in determining whether federal question jurisdiction exists is deciding when the relation of federal law to a case is such that the action may be said to be one 'arising under' that law."[178] Furthermore, they note that "it cannot be said that any clear test has yet been developed to determine which cases 'arise under' federal law. There is no single rationalizing principle that will explain all of

173. Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 826–27 n.6 (1986) (Brennan, J., dissenting) (citing Alan D. Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563, 564–65 (1981)); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816).

174. *Merrell Dow Pharms.*, 478 U.S. at 826–27 n.6 (1986) (Brennan, J., dissenting).

175. U.S. CONST. art. III, § 2 (emphasis added).

176. Akhil Reed Amar, Article, *A Neo-Federalist View of Article III: Separating Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 265 (1985).

177. Verlinden B.V. v. Cent. Bank Nig., 461 U.S. 480, 494–95 (1983) ("Although the language of § 1331 parallels that of the 'Arising Under' Clause of Art. III, this Court never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction. Quite the contrary is true. Section 1331, the general federal-question statute, although broadly phrased, 'has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the [statute's] function as a provision in the mosaic of federal judiciary legislation. *It is a statute, not a Constitution, we are expounding.*'") (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959)).

178. 13B WRIGHT, MILLER & COOPER, *supra* note 120, § 3562.

the decisions on this point."[179] Nonetheless, it is well settled that Article III requires a "case or controversy" for proper subject matter jurisdiction.[180] That is, the outcome of the case must "rise or fall" on the construction of the federal issue.[181] In addition, the claim must contain a "potential" federal issue for there to be proper constitutional subject matter jurisdiction.[182]

2. Statutory Subject Matter Jurisdiction: 28 U.S.C. § 1331

a. Creation test: Examples of implied and express rights of action

According to Justice Holmes' "Creation Test," "[a] case arises under federal law if and only if federal law creates the plaintiff's cause of action."[183] Therefore, if a private right of action is implied from the terms of a treaty, federal question jurisdiction necessarily exists.[184]

i. Vienna Convention on Consular Relations and *Jogi v. Voges*: An example of a treaty with an implied private right of action

In 1963, ninety-two nations codified existing customary international law on consular relations by adopting the Vienna

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179. *Id.*

180. This is to prevent the courts from rendering advisory opinions and protects the courts from working outside the adversarial process—something courts are not good at. Standing is always a key element of the case or controversy requirement. Georgene M. Vairo, *Selected Problems in Federal Jurisdiction: Standing, Implied Rights of Action Pendent Jurisdiction, and Abstention*, *in* 1 TRIAL EVIDENCE, CIVIL PRACTICE, AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 363, 365 (ALI-ABA ed., 1991).

181. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 822 (1824). *Contra* sources cited *infra* note 167.

182. *Osborn*, 22 U.S. at 824.

183. ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 290 (Aspen Law & Business 2003) (noting that "[t]he Supreme Court applied Holmes's Creation Test in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916)").

184. *See supra* Part C.2. for a discussion of when private rights of action are implied. However, Wright, Miller and Cooper note that "[t]he extension of federal question jurisdiction to treaties is of limited significance because it is rare that the relation of a treaty to the plaintiff's claim will be sufficiently direct to satisfy the test of 'arising under.'" 13B WRIGHT, MILLER & COOPER, *supra* note 120, § 3563. But see Part IV.B.2. *infra* for a discussion on how this may change.

Convention on Consular Relations ("VCCR").[185] However, the United States did not ratify this treaty until 1969 because of worries that the treaty only codified minimum standards.[186] But, once ratified, the VCCR was determined to be self-executing.[187] That is, the VCCR was enforceable law without implementing legislation.

(A). Primary right

One provision of the VCCR, article 36, has created a flurry of litigation since its ratification. The article generally governs the communication between consuls and the foreign nationals of his country. While many courts and commentators have argued that the Preamble to the treaty restricts its applicability to consular relations, others have successfully argued that article 36 confers a primary right upon foreign nationals to be in contact with their consulate when arrested or detained in a foreign, signatory country.[188] Specifically, article 36(1)(b) requires arresting authorities to inform the individual foreign national of "his right" to contact his consulate in order to obtain assistance and counsel.[189] It goes on to impose a

185. VCCR, *supra* note 2.

186. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 568–69 (1997).

187. Standt v. New York, 153 F. Supp. 2d 417, 423 n.3 (S.D.N.Y. 2001) (citing Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring)); S. EXEC. REP. NO. 91-9, app., at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Advisor, Department of State) (noting that the United States considers the VCCR to be "entirely self-executive").

188. Most courts have assumed without deciding that the VCCR confers primary rights upon individuals. *E.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998); United States v. Emuegbunam, 268 F.3d 377, 390 (6th Cir. 2001). For a more thorough discussion of the VCCR, see NANDA & PANSIUS, *supra* note 43, § 10:10; Emily Deck Harrill, *Exorcising the Ghost: Finding a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations*, 55 S.C. L. REV. 569 (2004); Vázquez, *Treaty-Based Rights*, *supra* note 1; Kadish, *supra* note 186, at 594; Quigley, *supra* note 7, at 561–70; David Sweis, *The Availability of Damages to Foreign Nationals for Violation of the Consular Relations Treaty*, 19 N.Y. INT'L L. REV. 63 (2006); Kweku Vanderpuye & Robert W. Bigelow, *The Vienna Convention and the Defense of Noncitizens in New York: A Matter of Form and Substance*, 18 PACE INT'L L. REV. 99 (2006); Anthony Jones, Comment, Jogi v. Voges*: Has the Seventh Circuit Opened the Floodgates to Vienna Convention Litigation in U.S. Courts?*, 15 MINN. J. INT'L L. 425 (2006).

189. VCCR, *supra* note 2, art. 36(1)(b) ("*[I]f [the detained foreign national] so requests*, the competent authorities of the receiving State *shall*, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner . . . . The said authorities shall inform the person concerned without delay of *his rights* under this sub-paragraph." (emphasis added)).

duty upon arresting officials to, upon the alien's request, inform the alien's consulate of the arrest.[190]

Depending on where in the treaty the court begins its analysis of whether the treaty confers a primary right upon an individual, the courts reach different results.[191] Those whose analysis begins with the Convention's preamble[192] hold that the VCCR was intended only to govern consular relations,[193] and not to provide individual primary rights. On the other hand, those whose analysis begins with the treaty's operative text come to the opposite conclusion.[194] Generally, both statutory and treaty construction call for courts to resort to preambles as interpretation aids only when the text is ambiguous.[195]

Finally, the United States Supreme Court had the opportunity to settle this issue in *Sanchez-Llamas v. Oregon*,[196] but declined to do so.[197] Instead, the Court assumed that the VCCR created a private primary right, and dismissed the case for other reasons.[198]

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190. *Id.*

191. Quigley notes that the reluctance of courts to give foreign nationals private rights under article 36 is partly the fault of the Executive Branch, where "the State Department has maintained, contrary to the clear text of the Vienna Convention, that the right of consular access relates only to the two States involved—the receiving State and the sending State—but not to a foreign national detainee." Quigley, *supra* note 7, at 565.

192. VCCR, *supra* note 2, pmbl. ("*Realizing* that the purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States . . . ." (emphasis added)).

193. *See, e.g.*, *Emuegbunam*, 268 F.3d at 388–93; United States v. Jimenez-Nava, 243 F.3d 192, 196–98 (5th Cir. 2001); United States v. Li, 206 F.3d 56, 62 (1st Cir. 2000) (en banc).

194. *See, e.g.*, Jogi v. Voges, 425 F.3d 367, 374–76 (7th Cir. 2005) ("There is an obvious tension between the broad language of the clause in the Preamble that appears to disclaim any general intent to protect individuals, and the language of Article 36."); Standt v. New York, 153 F. Supp. 2d 417, 424–25 (S.D.N.Y. 2001) (deciding that the preamble's reference to "individuals" meant that the VCCR was not intended to create rights for consular officials, not that it intended no rights for individual foreign nationals).

195. *Jogi*, 425 F.3d at 381 ("It is a mistake in any event to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous.").

196. 126 S. Ct. 2669, 2674 (2006).

197. However, in her concurring opinion, Justice Ginsburg did conclude that the VCCR created a private primary right, *id.* at 2688 (Ginsburg, J., concurring), as did Justice Breyer in his dissenting opinion, which was joined by Justice Stevens and Souter, *id.* at 2690 (Breyer, J., dissenting).

198. *Id.* at 2674 (deciding two cases together, the Court held that suppression of evidence was not a proper remedy for violation of the VCCR and that a post-conviction habeus claim based on a VCCR violation was subject to state procedural-default rules which barred the defendant's claim).

(B). Secondary right

Since by its terms, the VCCR only applies to "competent authorities" with the power to arrest, detain, or commit individuals to prison,[199] in the United States it only applies to local, state and federal law enforcement officials. Therefore, an individual foreign national whose primary rights under the VCCR are violated may sue local, state, or federal law enforcement officials using 42 U.S.C. § 1983 or *Bivens* as private rights of action.[200] Therefore, there is no need to imply a secondary right or private right of action from the terms of the VCCR because that treaty only binds law enforcement officials.[201]

(C). Remedies

Generally, a violation of the VCCR will not justify suppressing evidence,[202] overturning convictions[203] or indictments, or granting habeas petitions.[204] Also, procedural default rules do apply, so the plaintiff must assert his or her VCCR claim at trial.[205] However, an individual may sue for damages.[206]

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199. VCCR, *supra* note 2, at art. 36.1.b.

200. *See supra* Part C.2.a.

201. Standt v. New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001). However, even after endorsing Vázquez's approach in *Treaty-Based Rights*, *supra* note 1, which calls for carefully distinguishing primary and secondary rights, *id.* at 423, the court gets sloppy when it states, "[i]n sum, the language of the VCCR, coupled with its 'legislative history' and subsequent operation, suggest that Article 36 of the VCCR was intended to provide a private right of action to individuals detained by foreign officials." *Id.* at 427. Then the court quotes a case which reasoned, "the better reading of the treaty is that a foreign national does have standing to assert his or her right to consular notification under Article 36 of the [Vienna] Convention." *Id.* (quoting United States v. Rodrigues, 68 F. Supp. 2d 178, 183 (S.D.N.Y. 1999)). Standing and a private right of action do not refer to the same analytical issue. *See supra* Part C.1. Even so, it is clear that the court considered 42 U.S.C. § 1983 to be the private right of action which the plaintiff, an alien, was invoking to enforce his primary rights under the VCCR. *Standt*, 153 F. Supp. 2d at 427–30 (dismissing the lack of enumerated remedy in the VCCR as a reason not to allow § 1983 claims for violations of those rights).

202. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2674 (2006) ("We conclude, even assuming the [Vienna] Convention creates judicially enforceable rights, that suppression is not an appropriate remedy for a violation of Article 36 . . . .").

203. Breard v. Greene, 523 U.S. 371, 377 (1998).

204. *Id.*

205. *Id.* at 376.

206. *See Sanchez-Llamas*, 126 S. Ct. at 2680 (noting that the terms of the VCCR "require an appropriate judicial remedy of *some* kind," and so has not foreclosed the possibility that the Court will endorse suing for monetary damages for violating the VCCR).

Sometimes courts will discuss the secondary right or private right of action issue in terms of whether the treaty provides a remedy. For example, in *Jogi v. Voges*, the Seventh Circuit dismissed the defense's argument that the VCCR contained no private right of action because the treaty itself did not dictate appropriate judicial remedies for its violation.[207] In its decision, the court properly noted that multilateral treaties involve countries with sometimes very different legal systems.[208] Therefore, to agree on a uniform remedy would be impracticable. However, the VCCR does contain a mandate that

> [t]he rights referred to in paragraph 1 of... Article [36] shall be exercised in conformity with the laws and regulations of the receiving State, [the State where the foreign national finds himself detained,] subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[209]

Therefore, the court concluded: "This means that a country may not reject every single path for vindicating the individual's treaty rights. In the absence of any administrative remedy or other alternative to measures we have already rejected (such as suppression of evidence), a damages action is the only avenue left."[210]

(D). Subject Matter Jurisdiction

There are two jurisdictional statutes which would allow a claim based on the VCCR to be plead in federal court. First, because the VCCR only applies to foreign nationals, jurisdiction is proper under 28 U.S.C. § 1350,[211] the Alien Tort Statute ("ATS"), if violation of the VCCR amounts to a tort.[212] The ATS reads, "The district courts

207. Jogi v. Voges, 425 F.3d 367, 384–85 (7th Cir. 2005).

208. *Id.* ("It is unremarkable that the [VCCR] does not spell out particular methods of enforcement. Treaties, after all, are signed by countries with differing legal systems that provide different kinds of remedies.").

209. VCCR, *supra* note 2, art. 36(2).

210. *Jogi*, 425 F.3d at 385.

211. 28 U.S.C. § 1350 (2006); *see supra* note 159 and accompanying text.

212. The Seventh Circuit did not decide whether a violation of the VCCR amounted to a tort for purposes of the ATS because they determined jurisdiction by the federal courts would also be proper under 28 U.S.C. § 1331.

shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[213]

Second, by its terms, 28 U.S.C. § 1331 provides jurisdiction over cases "arising under" treaties. Therefore, jurisdiction is proper under the general federal question statute.[214] In addition, Congress may execute Article III's constitutional grant of jurisdiction by enacting other statutory jurisdictional statutes.[215] Even so, cases within Congress' statutory jurisdictional mandates must fulfill Article III's requirements.[216] For example, several treaties implementing statutes have contained express Congressional grants of federal subject matter jurisdiction.[217]

ii. Hague Convention on the Civil Aspects of International Child Abduction: A treaty with an express private right of action

Historically, a parent had no recourse to secure the return of children whose other parent moved them internationally in violation of a custody order. Sometimes the removing parent took their children in search of a better forum in which to adjudicate their custody disputes,[218] others to escape abusive relationships.[219] Many

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> Because we have found that jurisdiction is proper under either the ATS or the general federal question statute, 28 U.S.C. § 1331, we need not decide whether a violation of Article 36 is best characterized as a "tort" (perhaps something along the lines of breach of duty to disclose in the context of a special relationship) or a regulatory violation.

Jogi, 425 F.3d at 385. Interestingly, the Seventh Circuit relied heavily on the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), when it reversed the district court's dismissal of Jogi's claim for lack of subject matter jurisdiction. *Jogi*, 425 F.3d at 371–73. In *Sosa*, the Supreme Court limited the ATS to a jurisdictional mandate only, except for certain violations of customary international law norms which are "so well defined as to support the creation of a federal remedy," where § 1350 could provide a private right of action. *Sosa*, 542 U.S. at 738. Accordingly, the Seventh Circuit rightly held that Jogi could plead his claim against the county law enforcement officials using 42 U.S.C. § 1983 and then jurisdiction was proper under the treaty "branch" of § 1350 and under the general federal question statute, § 1331. *Jogi*, 425 F.3d at 373 ("Today, we cannot imagine a case that an alien could bring under the 'treaty' branch of § 1350 that would not also fall within the 'treaty' jurisdiction of § 1331.").

213. 28 U.S.C. § 1350 (2006).

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

215. *E.g.*, 28 U.S.C. §§ 1330–1369 (2006).

216. Verlinden B.V. v. Cent. Bank Nig., 461 U.S. 480, 491 (1983) (citing Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809)).

217. 42 U.S.C. § 11603; 9 U.S.C. §§ 203, 205. See also D.2.b.i. *infra* for more discussion.

218. For a general exposition on forum selection in the context of international disputes, see Petrossian, *supra* note 26.

countries did not consider this to be kidnapping, only a parental custody dispute, and were therefore not invested in assisting the abandoned parent. The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") was signed in 1980 to establish judicial procedures to affect the prompt return of children moved internationally in violation of *de facto* custody arrangements or formal custody orders.[220] Signatory countries wanted to discourage parents from forum shopping, but acknowledging that a child's mandated return to one parent might endanger both child and parent, they adopted some affirmative defenses to wrongful removal and retention claims.[221] For example, where the removing parent can show that there is a "grave risk" of "physical or psychological harm" associated with returning the child

219. Apparently the Convention's drafters anticipated that the abductors would generally be fathers who were denied custody rights. Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U.J. GENDER SOC. POL'Y & L. 749, 764–65 (2003) [hereinafter Weiner, *Domestic Violence*]. In fact, approximately seventy percent of abductors are custodial mothers, often fleeing domestic violence. *Id.* at 765 (citing Nigel Lowe et al., *A Statistical Analysis of Applications Made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Preliminary Doc. No. 3 of March 2001 for the Attention of the Special Commission of March 2001, 8 (2001)).

220. Hague Convention, *supra* note 4, pmbl. ("Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protections for rights of access . . . ."). *See generally* Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 44 (2003) [hereinafter Silberman, *Patching Up*]; Linda Silberman, *Interpreting the Hague Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049 (2005); Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275 (2002) [hereinafter Weiner, *Purposive Analysis*]; Weiner, *Domestic Violence*, *supra* note 219.

221. Hague Convention, *supra* note 4, art. 13(b). While these "well-settled" exceptions to mandatory return are available, Hague Convention, *supra* note 4, art. 12, some scholars advocate for amending the Hague Convention to better protect domestic violence victims. *E.g.*, Silberman, *Patching Up*, *supra* note 220, at 45 ("An exception for an 'abducting custodial mother' has been created in a variety of ways in the Convention. Though no such double standard should be tolerated, the Convention must find more creative responses to the realities of trying to separate a child from its primary caretaker and of protecting children and a spouse from abuse or domestic violence when necessary."); Weiner, *Domestic Violence*, *supra* note 219, at 769 ("The Hague Convention on Child Abduction traps countless numbers of women and children in abusive relationships. These are victims who never try to flee for safety because they know the Hague Convention will force them to return their children.").

to the country of origin, the courts may decline to enforce the return.[222]

The United States implemented the provisions of the Hague Convention when Congress passed 42 U.S.C. §§ 11601–11610 in 1988, which it called the International Child Abduction Remedies Act ("ICARA").[223]

To place this discussion within this article's broader discussion of treaty rights, the Hague Convention and ICARA pose different interpretative concerns than the VCCR. First, whether the Hague Convention is self-executing is not an issue with which to be concerned. Congress expressly implemented the Hague Convention when it passed ICARA in 1988.[224] In contrast, the VCCR is self-executing and so implementing legislation is unnecessary. Second, in contrast to the VCCR,[225] it is only necessary for the courts to determine how broadly to interpret ICARA's primary rights because ICARA contains an express private right of action.[226] Moreover, unlike the VCCR,[227] courts do not have to imply private right of action for ICARA to be enforceable by an individual in a judicial proceeding.[228] Third, Congress expressly gave state and federal courts concurrent jurisdiction over claims arising under the Hague Convention and ICARA.[229] Also unlike the VCCR,[230] subject matter jurisdiction is appropriate given ICARA's express provision of 42 U.S.C. § 11603,[231] and therefore 28 U.S.C. § 1331 is redundant.

However, even though the ICARA poses seemingly fewer opportunities for judicial interpretation, the federal courts have narrowly construed the Hague Convention and ICARA—perhaps to the point of contravening Congress' intent.[232] This discussion highlights that one still must beware of courts' efforts to restrict access to federal courts for cases arising under treaties—especially

222. Hague Convention, *supra* note 4, art. 13(b).

223. 42 U.S.C. §§ 11601–11610 (2000).

224. Cantor v. Cohen, 442 F.3d 196, 199 (4th Cir. 2006).

225. *See supra* Part D.2.a.i.A.

226. *See Cantor*, 442 F.3d at 202.

227. *See supra* Part D.2.a.i.B.

228. *See Cantor*, 442 F.3d at 202.

229. 42 U.S.C. § 11603(a) (2006).

230. *See supra*D.2.a.i.D.

231. *See infra* Part.D.2.a.ii.D.

232. *See id.*

where those treaties' subject matters concern traditionally municipal issues like family law—even where a treaty has been implemented with a jurisdictional provision.

(A). Primary right

The findings section of ICARA, 42 U.S.C. § 11601(a), sets the framework for a court's analysis of ICARA and the scope of its primary rights[233]:

> (1) The international abduction or wrongful retention of children is harmful to their well-being.
>
> . . . .
>
> (4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes *legal rights* and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of *visitation rights*. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.[234]

This text clearly establishes a private primary right to have one's children returned to them if their children were removed from the country wrongfully or are wrongfully retained.[235] Moreover, it is

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233. *See Cantor*, 442 F.3d at 199.

234. 42 U.S.C. § 11601(a)(1), (4) (2006) (emphasis added). There, the United States adopted the same tone as the Hague Convention used in its preamble. The Hague Convention preamble states:

> The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access [visitation rights], Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions . . . .

Hague Convention, *supra* note 4, pmbl. (footnote omitted).

235. Compare to the language of the VCCR interpreted by the court in *Jogi*, 425 F.3d 367, 374 (7th Cir. 2005). *See supra* Parts D.2.a.i.A-B; *see also supra* note 201.

clear that the federal courts will exercise subject matter jurisdiction over wrongful removal and wrongful retention claims.[236]

However, Congress distinguished between adjudicating international abductions and turning federal court into family court when it included the following in the declarations section ICARA: "The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims."[237] This provision makes sense given that federal courts have long abstained from asserting jurisdiction over custody suits, even those with proper diversity jurisdiction.[238]

However, § 11601(a)(4) still indicates that these provisions may be used to "secur[e] the exercise of visitation rights" as well.[239] Despite this, the Fourth Circuit in *Cantor v. Cohen*[240] has interpreted this language very narrowly and denied the federal courts subject matter jurisdiction over claims involving visitation rights, in apparent contradiction with the express language of § 11601(a)(4).[241] Regardless of whether courts conclude Congress' intent should drive their exercise of subject matter jurisdiction,[242] several federal courts have similarly ignored ICARA's plain language.[243]

236. *Cantor*, 442 F.3d at 202 ("With the exception of the limited matters of international child abduction or wrongful removal claims, which is expressly addressed by the Convention and ICARA, other child custody matters, including access claims, would be better handled by the state courts which have the experience to deal with this specific area of the law.").

237. 42 U.S.C. § 11601(a)(4).

238. *Ex parte* Burrus, 136 U.S. 586, 593–94 (1890); *Cantor*, 442 F.3d at 202 (citing Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980)); Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983).

239. 42 U.S.C. § 11601(a)(4).

240. 442 F.3d 196 (4th Cir. 2006).

241. *See infra* PartD.2.a.ii.D.. In fact, the court has so narrowly interpreted this section that it seems to have been effectively read out of the statute.

242. *See supra* Part C.2.b.

243. *Cantor*, 442 F.3d at 201. The *Cantor* court cited the following decisions when it declined to exercise subject matter jurisdiction over a case involving access claims under the Hague Convention and ICARA: Naik v. Naik, 363 F. Supp. 2d 1025, 1030 (N.D. Ill. 2005); Wiggill v. Janicki, 262 F. Supp. 2d 687, 689 (S.D.W. Va. 2003); Neng Nhia Yi Ly v. Heu, 296 F. Supp. 2d 1009, 1011 (D. Minn. 2003); Teijeiro Fernandez v. Yeager, 121 F. Supp. 2d 1118, 1125 (W.D. Mich. 2000); Bromley v. Bromley, 30 F. Supp. 2d 857, 860–61 (E.D. Pa. 1998).

(B). Secondary Right

ICARA expressly states that "[i]t is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States."[244] Moreover,

> [a]ny person seeking to initiate judicial proceedings under the Convention for the return of a child *or for arrangements for organizing or securing the effective exercise of rights of access* to a child may do so by commencing a civil action . . . in any court which has jurisdiction of such action . . . .[245]

Even though this language seems clear, the Fourth Circuit in *Cantor* has performed an interpretative dance to ensure that "rights of access" may not be adjudicated in federal court.[246] Noting Congress' repeated reference to rights "under the Convention," the court went back to the language of the Hague Convention for guidance.[247] Article 21 of the Hague Convention deals with actions to secure access or visitation rights.[248] It states, "[t]he Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these [access] rights . . . ."[249] In the United States, the Central Authority is the State Department.[250] The court then compared Article 21's language, which lacks any mention of judicial proceedings, with Article 12, which expressly states that the "*judicial* or administrative authority . . . shall . . . order the return of the child" who has been wrongfully removed or retained.[251] Therefore, the court held that "under the Convention, [there is] no right to initiate judicial proceedings for access claims . . . ."[252] The court reached this

244. 42 U.S.C. § 11601(b)(1).

245. *Id.* § 11603(b) (emphasis added).

246. *See Cantor*, 442 F.3d at 199–202.

247. *Id.* at 199 (quoting 42 U.S.C. § 11603(b)).

248. Hague Convention, *supra* note 4, art. 21.

249. *Id.*

250. *Cantor*, 442 F.3d at 200.

251. Hague Convention, *supra* note 4, art. 12; *Cantor*, 442 F.3d at 209 (Traxler, J., dissenting) (emphasis added) (quoting Ly v. Heu, 296 F. Supp. 2d 1009, 1011 (D. Minn. 2006) (noting "[t]he lack of parallelism between Article 12 and Article 21 has led the district courts that have considered the issue to conclude that the Convention creates no judicial power to enforce rights of access")).

252. *Cantor*, 442 F.3d at 200. *Contra id.* at 208 (Traxler, J., dissenting) (citing 42 U.S.C. § 11603(b)) (noting that § 11603 "expressly contemplates that such actions [given concurrent

result despite the fact that once a non-self-executing treaty is implemented, it is the implementing legislation which constitutes the controlling domestic law—not the treaty.[253]

Additional evidence that Congress intended to allow courts to adjudicate all claims arising under the Convention, including access claims, is found in § 11603(e).[254] There, Congress established the burden of proof (preponderance of the evidence) for proving that a child has been wrongfully removed or retained.[255] But Congress also established preponderance of the evidence as the burden of proof required to show that the petitioner has access rights, so that the petitioner might "organiz[e] or secur[e] the effective exercise of rights of access . . . ."[256]

(C). Remedies

The only remedy for wrongful removal or retention prescribed by the Hague Convention is the return of the child to the jurisdiction which originally determined the custody arrangements.[257] By requiring the child's return without considering the merits of the parent's claims, the treaty's parties hoped to reduce forum shopping.[258] In addition, Congress adopted several of the Hague Convention's affirmative defenses in ICARA.[259]

However, the *Cantor* court adopted a distinction between the remedy available for wrongful removal or retention and that available in a case concerning visitation rights created in a Fourth

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jurisdiction in state and federal court] may include not only claims for the return of a child being held in violation of custody rights, but also claims 'for organizing or securing the effective exercise of rights of access'").

253. *Id.* at 210 (Traxler, J., dissenting) ("Despite the weight of authority, I am unconvinced, based on the language of ICARA, that federal courts lack jurisdiction to adjudicate Cantor's claim. In my view, even assuming for analytical purposes that the Hague Convention itself does not afford the non-custodial parent a judicial forum to enforce his rights to access, Congress nevertheless has done so."). Judge Traxler appropriately focused his interpretation on the implementing legislation of the Hague Convention because that is the enforceable domestic law. *See supra* note 70 and accompanying text.

254. 42 U.S.C. § 11603(e) (2006).

255. *Id.* § 11603(e)(1)(A).

256. *Id.* § 11603(e)(1)(B).

257. Hague Convention, *supra* note 4, art. 12.

258. Bader v. Kramer, 445 F.3d 346, 349 (4th Cir. 2006) (citing Miller v. Miller, 240 F.3d 392, 398 (4th Cir. 2001)).

259. 42 U.S.C. § 11603(e)(2) (2006).

Circuit unpublished opinion.[260] That court noted that the remedies for access claims are "less drastic" than those for wrongful removal or retention.[261] For example, the remedy for violating rights of access can be to "order[] that the custodial parent . . . reimburse the other parent for expenses incurred in exercising his or her rights of access."[262] Whereas the remedy for wrongful removal or retention in violation of custody rights is return of the child, except where limited exceptions apply.[263]

(D). Subject Matter Jurisdiction

According to ICARA, "The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."[264] In addition, Congress empowered our courts "to determine . . . rights under the Convention . . . ."[265] However, as discussed above, the Fourth Circuit has interpreted rights of access out of the "rights under the Convention" which may be adjudicated in federal or state court pursuant to § 11603(a).[266] In Judge Traxler's dissenting opinion in *Cantor*, he noted, "[o]n its face, the unqualified phrase 'rights under the Convention' encompasses 'rights of access' as well as 'rights of custody.'"[267] Therefore, Traxler concluded that a "straightforward reading" of § 11603 "suggests that ICARA affords aggrieved parents a judicial forum for resolving claims that involve either custody rights or access rights . . . ."[268] Moreover, Judge Traxler correctly adopted the Restatement's position that the implementing legislation of a non-self-executing treaty is what Congress has determined to be enforceable domestic law.[269] Therefore,

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260. Cantor v. Cohen, 442 F.3d 196, 205 (4th Cir. 2006) (citing Katona v. Kovacs, 148 F. App'x 158 (4th Cir. 2005)).

261. *Id.* (citing *Katona*, 148 F. App'x at 160)

262. *Id.* (citing *Katona*, 148 F. App'x at 160 (quoting Whallon v. Lynn, 230 F.3d 450, 455 n.3 (1st Cir. 2000))).

263. *Id.* (citing *Whallon*, 230 F.3d at 455 n.3).

264. 42 U.S.C. § 11603(a).

265. *Id.* § 11601(b)(4).

266. *See supra* note 7 and accompanying text.

267. *Cantor*, 442 F.3d at 208 (Traxler, J., dissenting).

268. *Id.*

269. *Id.* at 210 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987)).

> [i]n determining whether a judicial forum exists for the enforcement of access rights, I would not relegate the analysis solely to the text of the Hague Convention but instead would begin with the language of ICARA's judicial remedies provision and refer to the language of the Convention to inform my understanding of ICARA.
>
> . . . .
>
> . . . [S]ection 11603(b) unquestionably permits—in straightforward and unambiguous language—judicial proceedings alleging the wrongful removal of a child in violation of custody rights *or* the denial of the non-custodial parent's rights of access to the child, or both.[270]

Whether or not Traxler's dissenting opinion is ultimately vindicated, at this point federal courts have been stingy in their interpretation of ICARA's jurisdictional mandate. Claims arising under the Hague Convention and ICARA, but which involve rights of access, will likely be adjudicated in state court.[271]

iii. Creation test: A summary

To summarize, treaties containing private rights of action—whether express or implied—automatically fall within 28 U.S.C. § 1331's statutory grant of federal question jurisdiction.[272] This is the so-called Creation Test.[273] This article discusses two very different treaties which may be adjudicated in federal court because they contain private rights of action. The first, the VCCR, has been interpreted to contain implied secondary rights[274] which can be adjudicated in federal court pursuant to 28 U.S.C. § 1331, the general federal question statute, or 28 U.S.C. § 1350, the Alien Tort Statute.[275] The second, the Hague Convention, was implemented by Congress to contain express statutory primary and secondary rights.[276] In addition, Congress included a jurisdictional mandate in

270. *Id.* (citing 42 U.S.C. § 11603(b)).

271. *Id.* at 202 (majority opinion).

272. *See supra* Part D.2.a.

273. *See id.*.

274. *See supra* Part D.2.a.i.B.

275. *See supra* PartD.2.a.i.D..

276. *See supra* Parts.D.2.a.ii.A-B.

ICARA.[277] However, some courts have narrowly interpreted this grant of jurisdiction so that only some of the primary rights established by ICARA may be adjudicated in federal court.[278]

b. Federal question jurisdiction: Using state law causes of action to get into federal court

Where Congress has not expressly or impliedly created a federal private right of action, the litigant has the option to argue that the remedies for the treaty's violation are provided by state common law.[279] To do this, the litigant must argue that the state common law cause of action depends on the interpretation of a particular treaty provision.[280]

In order for federal courts to appropriately assert subject matter jurisdiction over a state common law claim, the state cause of action must rely on an essential,[281] substantial[282] and disputed[283] federal issue, which appears on the face of a well-pleaded complaint.[284]

> But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional

277. *See supra* Part D.2.a.ii.D..

278. *See id.*

279. This federal question problem has been called the "litigation-provoking problem" by Justice Frankfurter. Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 809–10 (1986) (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting)).

280. Vázquez, *Treaty-Based Rights*, *supra* note 1, at 1144–46.

281. Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936) (To fall within statutory federal question jurisdiction, "a right or immunity created by the Constitution or the laws of the United States [i.e., federal law] must be an element, and an essential one, of the plaintiff's cause of action.").

282. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 28 (1983) ("[T]he plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."); Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 199 (1921). *Contra Merrell Dow Pharm.*, 478 U.S. at 822 n.1 (Brennan, J., dissenting) ("[A] test based upon an ad hoc evaluation of the importance of the federal issue is infinitely malleable: at what point does a federal interest become strong enough to create jurisdiction? What principles guide the determination whether a statute is 'important' or not?").

283. The Supreme Court held "a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'" *Merrell Dow Pharms.*, 478 U.S. at 808–09 (quoting *Franchise Tax Bd.*, 463 U.S. at 9).

284. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

> judgment about the sound division of labor between state and federal courts governing the application of [28 U.S.C.] § 1331.
>
> . . . [Therefore,] the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.[285]

In addition, until the Supreme Court decided *Grable* in 2005, some circuits, relying on the Court's ambiguous language in *Merrell Dow*, denied federal question jurisdiction if there was no federal cause of action.[286] Thankfully for litigants pursuing treaty-based claims, in *Grable* the Court retreated from the idea that *Merrell Dow* "convert[ed] a federal cause of action from a sufficient condition for federal-question jurisdiction into a necessary one."[287] Therefore, "*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not

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285. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–14 (2005). Contrast Justice Brennan's statement in *Merrell Dow Pharmaceuticals*:

> And, while the increased volume of litigation may appropriately be considered in connection with reasoned arguments that justify limiting the reach of § 1331, I do not believe that the day has yet arrived when this Court may trim a statute solely because it thinks that Congress made it too broad.

478 U.S. at 829 (Brennan, J., dissenting).

286. *Grable & Sons*, 545 U.S. at 311. The confusion in the wake of *Merrell Dow* is understandable given language like this:

> We simply conclude that the congressional determination that there should be *no federal remedy* for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction.

Merrell Dow Pharms., 478 U.S. at 814 (emphasis added). In *Merrell Dow*, Justice Brennan also strongly criticized the majority's vaguely reasoned conclusion that no federal remedy or cause of action means no federal question jurisdiction:

> Why should the fact that Congress chose not to create a private federal *remedy* mean that Congress would not want there to be federal *jurisdiction* to adjudicate a state claim that imposes liability for violating the federal law? Clearly, the decision not to provide a private federal remedy should not affect federal jurisdiction unless the reasons Congress withholds a federal remedy are also reasons for withholding federal jurisdiction. Thus, it is necessary to examine the reasons for Congress' decisions to grant or withhold both federal jurisdiction and private remedies, something the Court has not done.

Id. at 825–26 (Brennan, J., dissenting).

287. *Grable & Sons*, 545 U.S. at 317 (footnote omitted).

dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires."[288]

The litigant must balance between two countervailing issues: the so-called "floodgates" issue and abstention. On the one hand, it is obvious that the concern for "opening the floodgates" is integral in a federal court's decision to assert subject matter jurisdiction over a particular class of claims. Therefore, a litigant who wishes to adjudicate his or her claim in federal court must convince that court that allowing a state law claim based on a treaty's primary right will not open the floodgates. While litigation in the area of international human rights, business, and environment has increased in the last quarter century, this type of claim should not generally be considered a "litigation-provoking problem."[289]

In addition, as opposed to state law claims based on federal primary rights, a state law claim based on a treaty's primary right implicates international obligations and foreign policy. These are excellent policy reasons for allowing these types of claims into federal court. On the other hand, these international law and foreign policy implications create the reasons for judicial abstention in the form of forum non conveniens transfers, dismissal for reasons of comity or the political question doctrine. So while the litigant can use foreign policy as a reason for allowing the case into federal court, the litigant must take care to emphasize that by accepting jurisdiction the judiciary is playing its appropriate role and is not encroaching on the executive branch's turf. This is a tight balancing act because the various ways that the judiciary may abstain from hearing a case are the reasons why adjudicating treaty-based rights in federal law will not open the floodgates.

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288. *Id.* at 318 (quoting *Merrell Dow Pharms.*, 478 U.S. at 810). Citing its reasons for *Merrell Dow*,

> The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues.

Id.

289. *See supra* note 8. Forum non conveniens might be the solution to the floodgates problem.

i. Treaties: Substantial, disputed federal questions?

At this time (to the knowledge of this author), no court has determined a state law cause of action "arises under" federal law where it implicated a treaty. Several courts interpreted one Texas statute, Texas Revised Civil Practice and Remedies Code § 71.031, as creating a substantial federal question worthy of allowing removal of state law causes of action brought under it[290] until the Fifth Circuit closed that door when it decided *Torres v. Southern Peru Copper Corporation* in 1997.[291] Section 71.031 granted plaintiffs injured in foreign countries standing in Texas courts when the country in which they had been injured had "equal treaty rights" with the United States.[292] This required Texas courts to interpret various treaties of friendship and, so the argument went, thus created a substantial, disputed federal question allowing removal of the claim to federal court.[293] But the Fifth Circuit determined that "[t]he mere fact that section 71.031 requires a Texas state court to examine treaties to determine whether a plaintiff has standing is insufficient by itself to create federal jurisdiction."[294] However, it is noteworthy that this case was decided pre-*Grable*. If *Grable* expands a court's analysis of whether federal question jurisdiction exists beyond mere determination of whether an express private right of action exists,[295] then a treaty which provides a litigant with primary rights may be sufficient to create federal question jurisdiction.[296]

There are several reasons why no litigant has successfully maintained or removed a state law cause of action based upon a treaty-based primary right to federal court pursuant to 28 U.S.C. § 1331. For one, so few treaties affect the rights of individuals, compared to those which govern state action. In addition, enforcing a treaty which affects the primary rights and obligations of states and

290. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 675, 679 (Tex. 1990) (determining that the doctrine of forum non conveniens had been statutorily abolished, so did not apply in this case, but that federal subject matter jurisdiction was appropriate even so); *see also* Thad T. Dameris & Michael J. Mucchetti, *Vectors to Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases*, 62 J. AIR L. & COM. 959, 965–68 (1997).

291. 113 F.3d 540, 542 (5th Cir. 1997).

292. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a)(3) (Vernon 2006).

293. Dameris & Mucchetti, *supra* note 290, at 966–67.

294. *Torres*, 113 F.3d at 542.

295. *See supra* notes 156–60 and accompanying text.

296. *See infra* D.2.b.ii.B for further discussion of this possibility.

their officials necessarily means that, upon breach, the plaintiff or defendant will be the state or its officials. In that case, subject matter jurisdiction may be appropriate under the FSIA.[297] On the other hand, what cannot be done pursuant to § 1331, may be done pursuant to other Congressionally created jurisdictional provisions.

ii. State law causes of action with federal jurisdictional mandates: The New York Convention

Just as Congress executed Article III's jurisdictional grants in 1875 when it enacted 28 U.S.C. § 1331, Congress has the power under Article II to create other jurisdictional statutes. Even so, Congress is nonetheless constrained by the terms of Article III.[298] However, when Congress exercises its constitutional right to pass federal statutes which comprehensively regulate a particular field, it may also choose to allow federal courts to adjudicate cases "arising under" that set of laws.[299] Accordingly, the Supreme Court found that Congress may pass jurisdictional statues which grant federal jurisdiction over "purely" state law causes of action when it does so pursuant to a comprehensive federal statutory framework, because the jurisdictional mandate reflects Article III "arising under jurisdiction."[300] Nonetheless, the requirements detailed in Part IV still apply: the case must necessarily raise a disputed question under the comprehensive federal statutory scheme created by Congress.[301]

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297. 28 U.S.C. § 1608 (2006). To be clear, FSIA does not provide a cause of action itself. *E.g.*, First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 620 (1983). In addition, the FSIA only abrogates sovereign immunity in particular circumstances.

298. For a recent case where Congress' power to pass jurisdictional statutes was challenged for exceeding Article III, see *Verlinden B.V. v. Cent. Bank Nig.*, 461 U.S. 480 (1983) (finding that Congress was within its rights to allow plaintiffs to sue foreign states in federal court using non-federal causes of action pursuant to the FSIA, a broad federal statutory framework governing sovereign immunity).

299. *See id.* at 496–97 ("That the inquiry into foreign sovereign immunity is labeled under [FSIA] as a matter of jurisdiction does not affect the constitutionality of Congress' action in granting federal courts jurisdiction over cases calling for application of this comprehensive regulatory statute.").

300. *See* Mizuna, Ltd. v. Crossland Fed. Sav. Bank, 90 F.3d 650 (2d Cir. 1996) (holding that the jurisdictional provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 is constitutional); *Verlinden B.V.* 461 U.S. at 494–96 (holding that the jurisdictional provision of the FSIA is constitutional).

301. *Verlinden B.V.*, 461 U.S. at 493–94 ("At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions [to a foreign sovereign's default immunity] applies—and in doing so it must apply the detailed federal law standards set forth in the Act.").

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") was drafted in 1958 to "assist the uniform and efficient enforcement of arbitration agreements and awards in foreign commerce."[302] Thus, signatories of the New York Convention agree to enforce arbitration provisions and their subsequent awards.[303] The United States ratified the New York Convention in 1970, with reservations that the treaty be non-self-executing, and Congress passed implementing legislation in 1970.[304] The implementing legislation was codified in Chapter 2 of the Federal Arbitration Act.

(A). Primary right

As implemented in the United States, the New York Convention did not create new primary rights. Instead, Congress ratified the New York Convention in 1970 with the sole intention of funneling international arbitral disputes, regardless of the fact that they would be being enforced by purely state law causes of action, into federal court.[305]

(B). Secondary right

As with primary rights, the New York Convention did not create an express or implied private right of action with which to enforce arbitral awards. As with the Federal Arbitration Act, Congress expected that litigants would invoke state common law causes of action to enforce these contractual provisions.[306] However, Congress was ready to allow those cases "'reasonabl[y] relat[ed]' [to] a foreign state" to be adjudicated in federal court.[307]

(C). Remedies

As with primary and secondary rights, the New York Convention, as implemented by Congress, did not create new

302. Banco de Santander Cent. Hispano v. Consalvi Int'l Inc., 425 F. Supp. 2d 421, 433 (S.D.N.Y. 2006) (citing S. REP. NO. 91-702, at 6 (1970)).

303. Beiser v. Weyler, 284 F.3d 665, 666 n.2 (5th Cir. 2002).

304. 9 U.S.C. §§ 201–208 (1970) (also known as Chapter 2 of the Federal Arbitration Act).

305. *See Beiser*, 284 F.3d at 666 n.2.

306. *See Banco de Santander Cent. Hispano*, 425 F. Supp. 2d at 425.

307. *Beiser*, 284 F.3d at 666 n.2.

remedies. Congress anticipated that state law would regulate available remedies for breach of contract.

(D). Subject Matter Jurisdiction

The implementing legislation for the New York Convention includes two jurisdictional provisions. The first, 9 U.S.C. § 203, grants Article III courts original jurisdiction over "[a]n action or proceeding falling under the Convention."[308] The second, 9 U.S.C. § 205, expressly provides removal jurisdiction for any case "[w]here the subject matter of an action or proceeding pending in a State court *relates to* an arbitration agreement or award falling under the [New York] Convention, the defendant . . . may, at any time before trial thereof, remove such action . . . ."[309] In addition, § 205 goes on to stipulate that "[t]he procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal."[310]

There are three reasons why the language and application of § 205 are significant: first, "relates to" is far broader language than the "arising under" language incorporated by reference into the standard removal statute, 28 U.S.C. § 1441;[311] second, § 205 expressly abrogates the well-pleaded complaint rule;[312] and third, the notice of removal may be served "any time before the trial."[313]

While federal question jurisdiction is determined by whether the claim "arises under" federal law, § 205 only requires that the claim "relate to" an arbitration agreement which falls under the Convention.[314] This phrase, "relates to," has been interpreted as broadly as it seems:

> [W]henever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case, the agreement "relates to" to the plaintiff's suit. . . . As long as the defendant's assertion [that the

308. 9 U.S.C. § 203.

309. *Id.* § 205 (emphasis added).

310. *Id.*

311. *Banco de Santander Cent. Hispano*, 425 F. Supp. 2d at 427.

312. *Id.*

313. *Id.*

314. 9 U.S.C. § 205 (1970).

> contract falls under the Convention] is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of "relates to."[315]

In contrast, the general removal statute, 28 U.S.C. § 1441, predicates proper removal on whether the claim could have been filed in federal district court in the first place.[316] Therefore, § 1441 incorporates § 1331's "arising under" language.[317] As discussed above, "arising under" has been interpreted much more strictly,[318] and accordingly requires more nuanced argumentation than when asserting proper subject matter jurisdiction pursuant to § 205.

In addition, § 205 expressly abrogates the well-pleaded complaint rule.[319] This rule normally requires that the basis for federal subject matter jurisdiction appear on the face of the plaintiff's well-pleaded complaint.[320] However, § 205 states, "the ground for removal provided . . . need not appear on the face of the complaint but may be shown in the petition for removal"[321]—a document generally employed by defendants.

Finally, § 205 abrogates 28 U.S.C. § 1446(b)'s requirement that the notice of removal be filed within thirty days of service of the state court pleadings.[322]

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315. Beiser v. Weyler, 284 F.3d 665, 669 (5th Cir 2002).

316. 28 U.S.C. § 1441(a) (2006) (stating that defendants may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"); Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (holding that removal is proper if the case could have been filed in federal court originally).

317. Banco de Santander Cent. Hispano v. Consalvi Int'l, Inc., 425 F. Supp. 2d 421, 427 (S.D.N.Y. 2006).

318. *See supra* notes 1778–82.

319. *Banco de Santander Cent. Hispano*, 425 F. Supp. 2d at 427, 429 (noting that the statute requires the court to determine "whether a defendant's defense arises under federal law from the 'petition for removal' alone"). Section 205 is constitutional even though it abrogates the well-pleaded complaint rule. *See id.* at 429–32. The well-pleaded complaint rule is a construction of 28 U.S.C. § 1331, a statute, not of Article III. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). Since Article III does not require the basis for removal to appear on the face of a well-pleaded complaint, Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824), § 205 is constitutional.

320. *Metro. Life Ins. Co.*, 481 U.S. at 63 ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law.").

321. 9 U.S.C. § 205 (1970).

322. *Banco de Santander Cent. Hispano*, 425 F. Supp. 2d at 427 (citing 28 U.S.C. § 1446(b) (2006)).

As a result of these three significant differences, courts have concluded that Congress intended Chapter 2 to "'channel' Convention cases 'away from the state courts and into federal courts . . . .'"[323] Consequently, § 205 allows "purely" state law causes of action to be removed to federal court.[324]

3. Statutory Subject Matter Jurisdiction: The Alien Tort Statute

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, allows aliens to bring tort claims for violations of treaties or laws of nations.[325] Accordingly, aliens may enforce primary rights gained from two sources: self-executing treaties and the laws of nations. However, most treaties affecting individuals, with the exception of the VCCR, are non-self-executing.[326] But treaties still play a role in ATS litigation: litigants use multi-lateral, non-self-executing treaties as evidence of what comprises the "law of nations" or customary international law.[327] The Supreme Court recently discussed the

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323. *Id.* at 432–33 (quoting *Verlinden B.V. v. Cent. Bank Nig.*, 461 U.S. 480, 493) (1983)) (acknowledging that even though the U.S. Supreme Court has not held that Chapter 2 is a statutory scheme sufficient which "comprehensively regulat[es]" a federal interest, as it has for FSIA, "this Court is convinced that under the teachings of *Verlinden* and *Mizuna* Chapter 2 constitutes a 'comprehensive scheme' that furthers 'uncontested' . . . goals").

324. *Id.* at 430.

325. 28 U.S.C. § 1350 (2006) ("The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). *See generally* Charles F. Marshall, *Re-framing the Alien Tort Act After* Kadic v. Karadzic, 21 N.C. J. INT'L L. & COM. REG. 591 (1996); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473 (1986). Much of the current debate regarding the ATS discusses the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and its definition of "law of nations." *See generally* Benjamin Berkowitz, Sosa v. Alvarez-Machain*: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R-C.L. L. REV. 289 (2005); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007); Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273 (2006); Sean D. Murphy, *Supreme Court Interpretation of Alien Tort Claims Act*, 98 AM. J. INT'L L. 845 (2004); Van Alstine, *Age of Treaties*, *supra* note 3. Very little has been written on the "treaty prong" of the ATS.

326. *See supra* note 4.

327. *E.g.*, Flores v. S. Peru Copper Corp., 343 F.3d 140, 157 (2d Cir. 2003) (citing ICJ Statute, June 26, 1945, art. 38, 59 Stat. 1055, 1060, U.S.T.S. 993) (noting that the ICJ accepts conventions as "competent proof of the content of customary international law"); Filartiga v. Pena-Irala, 630 F.2d 876, 881–83 (2d Cir. 1980) (citing the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948), the Declaration on the

definition of a law of nations in *Sosa v. Alvarez-Machain*[328]: "[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with . . . specificity . . . ."[329]

In addition, this strategy can be applied to treaties between one or more non-signatory parties.[330] For example, one court has analyzed the Hague Convention on the Civil Aspects of Child Abduction to determine if international parental child abduction violates the law of nations.[331] In this case, *Taveras v. Taveras*,[332] the court could not simply apply the Hague Convention as a treaty, as discussed above,[333] because the two claimants were from the Dominican Republic and their custody claim arose before the Hague Convention bound the United States and the Dominican Republic to enforce each country's custody decisions.[334] Therefore, the plaintiff's plea for return could only be governed by the Hague Convention's principles and obligations if the court determined that the Hague Convention itself represented the law of nations.[335] In that

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Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc A/1034 (1975), as evidence that torture violates the law of nations); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 279 (S.D.N.Y. 2003); Jama v. U.S. I.N.S., 22 F. Supp. 2d 353, 362 (D.N.J. 1998); Rosencranz & Campbell, *supra* note 7, at 154, 169 (quoting Hilao v. Estate of Ferdinand Marcos, 103 F.3d 789, 794 (9th Cir. 1996)) ("[T]he Ninth Circuit requires that the content of . . . international law . . . be proven by reference to 'the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.' The types of materials cited by the Ninth Circuit have included United Nations documents . . . and conventions . . . .").

328. 542 U.S. 692, 725 (2004).

329. *Id.*

330. *E.g.*, Taveras v. Taveras, 397 F. Supp. 2d 908 (S.D. Ohio 2005).

331. *Id.* at 911.

332. *Id.*

333. *See supra* D.2.a.ii.

334. *Taveras*, 397 F. Supp. 2d at 911. According to this court, "the Dominican Republic acceded to the Hague Convention on August 11, 2004 and its provisions went into effect there on November 1, 2005." *Id.* However, Article 36 of the Hague Convention requires that each new party to the Hague Convention gain the "acceptance of the accession" from each of the current parties to the Hague Convention, the "Contracting States." Hague Convention, *supra* note 4, art. 38. "It is undisputed that the United States and the Dominican Republic have not entered into the negotiations required by Article 38. Consequently, the Convention's administrative and judicial mechanisms are not yet applicable with regard to relations between the two countries." *Taveras*, 397 F. Supp. 2d at 911 (citing Gonzalez v. Gutierrez, 311 F.3d 942, 945 (9th Cir. 2002) ("Accession . . . binds a country only with respect to other nations that accept its particular accession under Article 38.")).

335. *Taveras*, 397 F. Supp. 2d at 913 (plaintiff citing *Adra v. Clift*, 195 F. Supp. 857, 863 (D. Md. 1961), in support of his position).

case, subject matter jurisdiction would be appropriate pursuant to § 1350.[336]

After a long discussion of the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*,[337] which, as discussed above, itself included a long discussion of when it was appropriate for a court to define a new violation of the law of nations,[338] the court determined that the defendant's conduct in abducting his child did not amount to a violation of the law of nations.[339] In coming to that conclusion, the court acknowledged the ramifications of finding that defendant's conduct violated the law of nations: "Doing so would permit foreign plaintiffs to litigate custody disputes in United States federal courts, thereby turning district courts nationwide into ill-suited family courts."[340] The court clearly concluded that jurisdiction under Alien Tort Statute's "law of nations" prong would be far broader than jurisdiction under ICARA, especially as interpreted by the Fourth Circuit in *Cantor*.[341] However, the court included this important footnote: "The Court makes explicit, however, that the severity required for a finding of a law of nations [violation] would almost certainly be present if an allegation of international child abduction involved credible allegations of physical, verbal or sexual abuse."[342] According to one scholar, "seven of the nine cases decided by the United States courts of appeals between July 2000 and January 2001 involved an abductor who alleged that she was a victim of domestic violence."[343] Therefore, most defendants are abductor-victims, whose conduct would not constitute a violation of the law of nations. However, it is possible that an abductor-perpetrator[344] would be

336. *Id.* (citing 28 U.S.C. § 1350 (2006)).

337. 542 U.S. 692 (2004).

338. *Id.* at 724–27.

339. *Taveras*, 397 F. Supp. 2d at 915.

340. *Id.*

341. *Id.* at 916. See *supra* Part D.2.a.ii for a discussion of the Hague Convention.

342. *Id.* at 915 n.6.

343. Weiner, *Purposive Analysis*, *supra* note 220, at 277.

344. *See generally* Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton's Legacy to Women's Rights*, 12 CARDOZO J.L. & GENDER 855, 855 (2006) ("Each year an estimated 600,000 to 800,000 people—mostly women and young girls—are trafficked across international borders, and millions more are trafficked within the borders of countries."). It is not inconceivable to imagine a parent might willingly participate in such trafficking. On the other hand, the Hague Convention as law of nations will not protect children from "internal" trafficking, where there is no cross-border

found to violate the law of nations for violating the principles and obligations of the Hague Convention,[345] even if they were not found to have violated the Hague Convention itself.

E. Conclusion

This article has discussed three categories of treaties and their implementing legislation, their three avenues or trails into federal court pursuant to 28 U.S.C. § 1331: first, a self-executing treaty which contains an express or implied private right of action fulfills Cardozo's Creation test. This avenue is exemplified by the VCCR,[346] but is also represented by the Warsaw Convention,[347] a treaty not discussed here. Second, a non-self-executing treaty, whose provisions are implemented by Congress, and include an express right of action may be adjudicated in federal court pursuant to § 1331. This avenue is illustrated by the Hague Convention on the Civil Aspects of International Child Abduction, as discussed *supra* in Part D.2.a.ii. Third, a treaty whose implementing provisions includes a jurisdiction mandate channeling "pure" state law causes of action into federal court is constitutional because it relates to a comprehensive federal statutory scheme. This avenue is illustrated by the New York Convention, as discussed *supra* in Part D.2.b.ii. This article also discussed the possibility that a treaty whose implementing provisions create a primary right and whose violation constitutes a tort may be invoked by a foreign national in federal court pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. In addition, treaties may provide necessary evidence of "norms of international character accepted by the civilized world" and so embody a law of nations. Finally, this article has suggested that as

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component to invoke the Hague Convention's protections. *See* Nilanjana Ray, *Looking at Trafficking Through a New Lens*, 12 CARDOZO J.L. & GENDER 909, 916–17 (2006).

345. *See* Tiefenbrun, *supra* note 344, at 855 ("Trafficking in women for the purpose of enslaving them in sex work is one of the oldest and most heinous violations of women's rights.").

346. *See supra* D.2.a.i.

347. *See generally* Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978); Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Greg T. Hill, Comment, *Terror in the Sky: Does Terrorism Return Airlines to an Infant Industry? Does the Warsaw Convention Liability Limit Fly High Again to Protect Vulnerable Airlines?*, 19 LOY. L.A. INT'L & COMP. L.J. 633 (1997); Larry Johnson, Note, *Warsaw Convention—A New Cause of Action for Emotional Distress Under Old Section 17: A Look at* Floyd v. Eastern Airlines, *872 F.2d 1467 (11th Cir. 1989)*, 20 GA. J. INT'L & COMP. L. 619 (1990); Michael P. Munro, Comment, *Subject Matter Jurisdiction in Warsaw Cases After* Malik v. Butta, 7 N.Y. INT'L L. REV. 171 (1994).

treaties continue to govern domestic areas of law and therefore individuals' obligations, it is possible that a treaty might form an essential, substantial, and disputed federal issue such that a state law cause of action dependant on it would constitute a federal question sufficient for subject matter jurisdiction pursuant to § 1331.