TIME FOR THE UNITED STATES TO START COMPLYING WITH HUMAN RIGHTS TREATIES: ON THE SELF-EXECUTING TREATY DOCTRINE AS TO HUMAN RIGHTS VIOLATIONS

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Abstract

The purpose of human right treaties' is to protect individuals within the party State's jurisdiction against human rights violations. Therefore, contrary to other international agreements, the main subject of human rights treaties is the individual subject to the party State's jurisdiction. Thus, this author proposes that complying with and carrying out human rights treaties' purpose entails being domestically enforceable. As such, due to the *Supreme* character that the U.S. Constitution gives to treaties this author concludes that human rights treaties in the U.S. are self-executing.

Resumen

El propósito de los tratados de derechos humanos es la protección de los individuos en contra de violaciones de derechos humanos, dentro de la jurisdicción de los Estados miembros. Contrario a otros acuerdos internacionales, el sujeto principal de un tratado de derechos humanos es el individuo supeditado a la jurisdicción del Estado miembro. Por tanto, esta autora propone que cumplir con el propósito de los tratados de derechos humanos conlleva, que sean domésticamente ejecutables. Por tal razón, debido al carácter *supremo* que la Constitución de Estados Unidos les adjudica a los tratados, esta autora concluye que los tratados de derechos humanos en Estados Unidos son autoejecutables.

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I. Introduction 112
II. International Law Before WWII........ 114
III. The Self-Executing Treaty Doctrine........ 116
IV. International Law after WWII: The Protection of Human Rights........ 122
V. Human rights treaties are self-executing........ 134
VI. Conclusion........ 144

I. Introduction

The purpose of human rights' treaties is to protect people subject to member states'[1] jurisdictions, against human rights violations.[2] After the atrocities committed in World War II (hereafter, *WWII*) against Jewish people, the protection of human rights has been one of the fundamental purposes of international and regional organizations, such as the United Nations (hereafter, *UN*).[3] As a consequence, these international and regional organizations' concern is the protection of *individuals within* the jurisdiction of States bound by human rights law.[4] As such, this article will propose that the purpose of human rights treaties, entails having domestic effect[5] and thus, are self-executing in the United States (hereafter, *U.S.*). One of the main reasons in support of this argument, that will be further discussed through this article, is that the U.S. Constitution provides that treaties –after negotiated by the Executive and consented by two thirds of the Senate[6]– are the *Supreme Law of the Land*.[7] However, the U.S. has entered into

[1] According to the Montevideo Convention on the Rights and Duties of States, a "sovereign State" as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states. Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 LNTS 19.

[2] *See* International Covenant on Civil and Political Rights art. 2(2) Jun. 8, 1992, 99 U.N.T.S. 171. (hereinafter, *ICCPR*).

[3] JEFFREY L. DUNOFF, ET AL, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 404-05 (3rd ed. 2010).

[4] *See* MARTHA F. DAVIS, ET AL, HUMAN RIGHTS ADVOCACY IN THE UNITED STATES 47-48 (2nd ed. 2018).

[5] Within State parties to a human rights treaty's jurisdiction., 314er, u be expalined legislative implementation by Congress prior to its enforcement by the judicial branch. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-67 (2004) (for an example where the U.S. Supreme Court compares specific conduct or legislation having foreign effect *vis a vis* domestic effect).

[6] U.S. CONST. art. II, § 2, cl. 2.

[7] "The Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the Supreme Law of the Land; *and the Judges in every State shall be bound thereby* . . . ." U.S. CONST. art. VI, cl. 2. (emphasis added).

several human rights treaties with a declaration[8] that such agreement will be non-self-executing.

As it will be later discussed, under U.S.' law a self-executing treaty is one that does not need legislative implementation by Congress prior to its enforcement by the judicial branch.[9] On the other hand, a non-self-executing treaty is only enforceable in U.S. courts after legislation has been implemented by Congress.[10] This article proposes that the U.S. ratifying a human rights treaty with a declaration that it will be non-self-executing is incompatible with such treaties' purpose and with the current time that we are living. Particularly, because the distinction between a self-executing treaty and a non-self-executing one was invented in the nineteenth century, where the only subject of international law were sovereign States.[11] As such, what happened within a State's jurisdiction as to its own nationals was not the major concern of international law. Nevertheless, after WWII, as to human rights treaties, individuals, and what happened with them *within* the state members' jurisdiction, became the main subjects of international law.[12]

Consequently, it makes no sense that after the U.S. President has negotiated a human rights treaty and two thirds of the Senate has consented to such agreement, a human rights treaty needs to be executed by Congress before it can be judicially enforceable by individuals whenever their human rights –universal, *unalienable* rights– are being violated.

In support of this conclusion, Section II will briefly explain the characteristics of international law in the nineteenth century to prove that in a way, the self-executing treaty doctrine was compatible with that time frame. In addition, Section II will discuss the supreme character that the U.S. gave to treaties before the judicial invention of the self-executing treaty doctrine. Section III will explain the self-executing treaty doctrine in detail. Section IV will explain international law's radical shift in focus to the protection of human rights. Finally, section V will elaborate on the self-executing character of human rights treaties.

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8 A declaration is a statement "of policy relating to the treaty that do not alter or limit its substantive provisions." BARRY E. CARTER, ET AL., INTERNATIONAL LAW 181 (6th ed. 2011). However, a declaration constitutes a reservation if "it purports to exclude, limit or modify [a] state's legal obligation." George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements, or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461, 464 (2007) (*quoting* Comments to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (AM. LAW. INST. 1987)).

9 *See* Foster v. Neilson, 27 U.S. 253, 314 (1829).

10 Whitney v. Robertson, 124 U.S. 190, 194 (1888).

11 *See* DUNOFF *supra*, note 3, at 403.

12 *See Id.* at 404-05.

II. International Law Before WWII

Positivists who dominated the international legal theory in the nineteenth century viewed that there was a sharp distinction between international laws, which are the laws applicable to sovereign states, and national law, which are the laws that apply to individuals.[13] According to the nineteenth century view, "only [sovereign] States could be viewed as subjects of international law,"[14] and thus, possessed rights under international law.[15] As such, a sovereign state's form of government did not affect the state's rights or obligations under international law.[16] In other words, what happened within a sovereign state's jurisdiction *as to its own nationals* was not a concern of international law.[17] It is in this context that U.S. Supreme Court created the self-executing treaty doctrine. However, as next subsection will explain, before this judicial invention, treaties and international law were regarded as part of the laws of the United States.

A. U.S. Perspective on the International Law Before the Judicial Invention of "Self-Executing or Non-Self-Executing Treaties" Doctrine

The framers of the U.S. Constitution regarded treaties[18] as part of the Supreme Law of the Land.[19] This view is reflected in Federalist Paper No. 64 written by John Jay in which he explains that it will not be the power of the President and Senate to make treaties which will not be binding upon the community.[20] Also,

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13 *Id.* at 403.

14 *Id.*

15 *Id.*

16 *Id.* at 6 (*citing* WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW 6-13 (2nd ed.)).

17 "International law did take cognizance of the ways in which a state treated foreign nationals present in the state's territory, but in strained and artificial way. If a state injure[d] a foreign national in a way that violate[d] an international legal obligation . . . then the state [would have] incurred in responsibility under international law." *Id.* However, the state responded to the foreigner's State, *not to the injured foreigner itself*. *Id.* There would have not been a cause of action for atrocities committed by States as to its own nationals. *See Id.* at 404.

18 According to the Vienna Convention on the Law of Treaties, a "treaty" is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties art. 2(1)(a), May 21, 1969, 1155 U.N.T.S. 331. Also, the Supreme Court of the United States has defined treaties as "'primarily a compact between independent nations.'" Medellin v. Texas, 552 U.S. 491, 505 (2008) (*citing* Head Money Cases, 112 U.S. 580, 598 (1884)).

19 *See* U.S. CONST. art. VI, cl. 2

20 *See* THE FEDERALIST NO. 64 by John Jay, *The Powers of the Senate*, N.Y. PACKET, (March 7, 1788) ("It will not be the power of the President and the Senate to make any treaties by which they and their families and estates will not be equally bound and affected with the rest of the community.") (*available at*: https://avalon.law.yale.edu/18th_century/fed64.asp (last visit Nov. 8, 2019).

this view is reflected in early jurisprudence regarding treaty compliance, where the Supreme Court expressed that it was the duty of federal and state Judges to declare null any law contrary to a treaty ratified by the U.S.[21]

Before the enactment of the U.S. Constitution, the Secretary of Foreign Affairs of the Confederation, John Jay, expressed to Congress that a treaty "made, ratified and published by Congress, . . . immediately [became] binding on the whole nation, and superadded to the laws of the land . . . . Hence [it was to be] received and observed by every member of the nation . . . ."[22] Congress later adopted that vision.[23] Additionally, John Jay wrote:

> These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, *but on us only so long and so far as we may think proper to be bound by it.* They who make laws, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them *but still let us not forget that treaties are made, not by only one of the contracting parties, but by both*; and consequently that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.[24]

John Jay's perspective on treaties was incorporated into the U.S. Constitution through the Supremacy Clause, which expresses that treaties are to be part of the *Supreme Law of the Land*.[25] It was also adopted by the Supreme Court Justices in the early cases regarding treaty interpretation.

For example, in *Ware v. Hylton*,[26] the Supreme Court issued a treaty decision that demonstrated the U.S. in faithful compliance with the Supremacy Clause of the U.S.

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[21] *See* Ware v. Hylton, 3 U.S. 199, 237 (1796).(edad.aso de autos, cuando una f. OJO: un banco no compra los crubastas, ningunaa la adquisicicpiedad.aso de autos, cuando una f

[22] JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 51 (1996) (citations omitted).

[23] *Id.* at 51-52.

[24] WILLEM THEO OOSTERVERLD, THE LAW OF NATIONS IN EARLY AMERICAN FOREIGN POLICY: THEORY AND PRACTICE FROM THE REVOLUTION TO THE MONROE DOCTRINE 157 (2016) (*citing* THE FEDERALIST NO. 64 (John Jay) at 378) (emphasis added).

[25] U.S. CONST. art. VI, cl. 2.

[26] *Ware*, 3 U.S. at 199.

Constitution. The treaty in question had a provision that was conflictive with a Virginia statute.[27] Justice Chase expressed that state and federal Judges' duty is to declare null and void any law contrary to a treaty made under the authority of the U.S.[28]

Later, in *Owings v. Norwood's Lessee*,[29] the question was whether one of the parties' right was protected by the treaty of peace with Great Britain.[30] Chief Justice Marshall reaffirmed that

> Each treaty stipulates something respecting the citizens of the two nations and gives them rights. Whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.[31]

Despite the framer's perspective on treaty compliance, the nature of treaties as part of the *Supreme Law of the Land*, the early jurisprudence in concordance with such point of view, and the Supreme Court's words in *Owings v. Norwood's Lessee*, the Supreme Court found a way to limit domestic compliance with international law.

III. The Self-Executing Treaty Doctrine

A. Self-Executing or Non-Self-Executing

The U.S. distinguishes self-executing treaties from non-self-executing treaties. The self-executing treaty doctrine was created by the U.S. Supreme Court in 1829 in *Foster v. Neilson.*[32] Although the Court did not use the term *self-executing*, it expressed that a treaty "[is] to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision;"[33] thus, binding federal law upon ratification. On the other hand, a non-self-executing treaty may not be enforced in U.S. and State courts unless Congress enacts legislation to carry such treaty into effect.[34]

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[27] *See Id.* at 277; *See also,* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1110 (1992) (*citing Ware*, 3 U.S. at 277).

[28] *Ware*, 3 U.S. at 237.

[29] 9 U.S. 344 (1809).

[30] *Id.* at 345.

[31] *Id.* at 348.

[32] 27 U.S. 253 (1829).

[33] *Id.* at 254.

[34] Medellin v. Texas, 552 U.S. 491, 505 (2008)*; See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) for a thorough explanation on the difference between a self-executing treaty and a non-self-executing treaty.he aid of any legislative provis4, 808 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, the aid of any legislative provis

Although this doctrine was originally applied to treaties, as this article will demonstrate, U.S. Courts have gone too far in extending it to other international agreements. For example, in *Medellin v. Texas*[35] the Supreme Court extended the self-executing treaty doctrine to judgments concerning U.S. behavior made by the International Court of Justice (hereafter, *ICJ*).[36] It cited the First Circuit opinion in *Igartúa De La Rosa v. United States,*[37] which expressed that while "treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.'"[38] The next subsection will explain in detail the development of self-executing treaty doctrine by the U.S. Supreme Court.

B. Foster v. Neilson and Its Progeny

Foster v. Neilson was decided almost two centuries ago. In this case, Foster –the plaintiff– claimed title to a tract of land in West Florida based on a grant from Spain.[39] However, Neilson –the defendant– argued "that the territory, within which the land claimed is situated, had been ceded, before the grant, to France [from Spain], and by France to the U.S. and that the grant is void, being made by persons who had no authority to make it."[40]

Foster's claim relied on the *Treaty of Amity, Settlement and Limits*, between the U.S. and Spain, specifically on the treaty's article 8.[41] Such treaty provision stipulated, that "the grants of land made before the 24th of January 1818 by [Spain] . . . shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of [Spain]."[42]

As to the interpretation of the 8th article mentioned above, the Supreme Court inquired: "Do these words act directly on the grants, so as to give validity to those

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35 552 U.S. 491 (2008).

36 *Id.* at 491.

37 417 F.3d 145, 150 (1st Cir. 2005).

38 *Medellin*, 552 U.S. 505 (*citing Igartúa-De La Rosa*, 417 F.3d at 150) (omissions in the original).

39 On October 1st, 1800, by the treaty of St. Ildefonso, Spain ceded Louisiana to France; and France by the treaty of Paris ceded it to the United States the April 30, 1803. *See Foster*, 27 U.S. 253. However, "Spain contended that her cession to France comprehended only that territory which as the time of the cession was denominated Louisiana. . . ." *Id.* The land claimed by plaintiffs lies within this disputed territory that Spain affirms did not cede to France by the treaty. *Id.*

40 Foster v. Neilson, 27 U.S. 253, 300 (1829).

41 *Id.* at 310.

42 *Id.*

not otherwise valid, or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?"[43] This inquiry revealed the first hint of the self-executing treaty doctrine: what the treaty conveys determines whether it will be self-executing. Later on, the Supreme Court deepened on the self-executing treaty doctrine and expressed:

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[44]

Evidently, the self-executing treaty doctrine starts with the interpretation of the text of the treaty. In *Foster,* the Supreme Court determined that the 8th article of the treaty between Spain and the United States was non-self-executing.[45] It determined that the language of the provision indicated that it was Congress' responsibility to pass an act to ratify and confirm the land grants ceded by Spain.[46] However, in *United States v. Percheman,*[47]*Foster* was overruled in part as to the determination that article 8 of the Treaty of Amity, Settlement and Limits of 1819, between Spain and the U.S. was non-self-executing. Nevertheless, the self-executing/non-self-executing treaty doctrine remained intact.

In *Percheman*, the Supreme Court was presented with the Spanish version of article 8 of the same treaty in *Foster*, which provided that the grants "[. . .] shall *remain* ratified and confirmed."[48] While in *Foster* the Supreme Court interpreted the English version of that article which read that the grants "[. . .]shall *be* ratified and confirmed."[49] The Supreme Court overruled *Foster* and held that the treaty operated of itself, based on the Spanish version of the text, together with the English version, which demonstrated that the treaty did not stipulate for some

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43 *Id.* at 314.

44 *Id.*

45 The Supreme Court did not use the term "non-self-executing". It referred to as treaties "equivalent to an act of the legislature" for self-executing treaties, and to treaties "that the legislature must execute before they can become a rule for the Court" for non-self-executing treaties. *See Id.*

46 *See Id*. at 315.

47 32 U.S. 51 (1833).

48 *Id*. at 52 (emphasis added).

49 Foster v. Neilson, 27 U.S. 253, 310 (1829) (emphasis added).

future legislative act.[50] Thus, the treaty provision that the Supreme Court in *Foster* determined was non-self-executing, in *Percheman* was concluded that it was self-executing.[51] Notice that the overruling in *Foster* was as to the interpretation of the Treaty of Amity, Settlement and Limits between Spain and the U.S. of 1819, to clarify that the such treaty is self-executing. Thus, the self-executing doctrine created in *Foster* remained intact.

However, in *Foster* and *Percheman* the Supreme Court did not use the term *self-executing treaty*. The term appeared for the first time in 1888 in *Whitney v. Robertson*,[52] a case concerning the language of a treaty between San Domingo and the U.S., governing the matter of importation and exportation of articles into and out of both countries. There, the Supreme Court determined that if there is conflict between the stipulations of a self-executing treaty and an act of Congress, the latter must prevail.[53] That means that Congress may modify self-executing provisions of a treaty or "supersede them all together."[54]

According to the Supreme Court in *Whitney*, the Constitution places treaties and acts of Congress as the *Supreme Law of the Land*.[55] Therefore, when a treaty and an act of Congress "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both . . . ; *but*, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing."[56]

In summary, these nineteenth century cases established that the determination of whether a treaty is self-executing starts with the interpretation of the language of the treaty, to see what it conveys. However, these were decided referring to treaties and international agreements between the United States and other sovereign states.

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50 *Percheman*, 32 U.S. at. 88-89.

51 *See Id.*

> Although the words 'shall be ratified and confirmed,' are properly the words of contract stipulating for some future legislative act; they are not necessarily so. They may import that they 'shall be ratified and confirmed,' by force of the instrument itself. When we observe, that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable. *Id.* at 89.

52 124 U.S. 190 (1888).

53 *Id.* at 194.

54 *Id*.

55 *Id.*

56 *Id.* (emphasis added).

C. Medellin v. Texas

In 2008, the U.S. Supreme Court decided *Medellin v. Texas*,[57] which extended the self-executing/non-self-executing treaty doctrine to judgments made by the ICJ. In *Medellin*, the Supreme Court decided that an ICJ judgment was not self-executing.[58] This ICJ judgment was the *Case Concerning Avena and Other Mexican Nationals* (hereafter, *Avena*).[59] In that decision, "[t]he ICJ held, that based on violations of the Vienna Convention on Consular Relations (hereafter, *Vienna Convention*), 51 named Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States."[60]

The background of *Medellin* is as follows. The U.S. ratified the Vienna Convention,[61] and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (hereafter, *Optional Protocol*).[62] The Vienna Convention provides that "if a person detained by a foreign country 'so requests, the competent authorities of the receiving State, shall, without delay, inform the consular post of the sending State' of such detention, and 'inform the [detainee] of his right' to request assistance from the consul of his own state."[63] Whereas the Optional Protocol "provides a venue for the resolution of disputes arising out of the interpretation or application of the Vienna Convention."[64] By ratifying the Optional Protocol, the U.S. consented to being under the jurisdiction of the ICJ for disputes under the Vienna Convention.[65]

In the *Avena* judgment, the ICJ held that the U.S. had violated the Vienna Convention by failing to inform the 51 named Mexicans of their rights under such Convention.[66] Namely that the competent authorities of the U.S. should have immediately informed the consular post of Mexico that a Mexican national had been arrested or detained within the U.S., and any communication addressed to the consular post of Mexico by the Mexican national should have been forwarded

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[57] 552 U.S. 491 (2008).

[58] *See Id.* at 522-23.

[59] Case Concerning Avena and Other Mexican Nationals (Mex. V. U.S.), Judgment, 2004 I.C.J. 12 (March 31).

[60] *Medellin*, 55 U.S. at 497-98.

[61] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[62] *Medellin*, 55 U.S. at 499.

[63] *Id.* at 499 (*citing* Vienna Convention on Consular Relations, *supra* note 62, 21 U.S.T. at 100).

[64] *Id*. (*citing* Vienna Convention on Consular Relations, *supra* note 67, 21 U.S.T. at 326).

[65] *Id.* at 500.

[66] *Id.* at 498.

without delay.[67] The *Avena* decision determined that the U.S. had to "provide, by means of its own choosing, review and reconsideration of convictions and sentences of the affected Mexican nationals."[68]

Medellin was one of the affected 51 named Mexican nationals. While Medellin was being prosecuted, the ICJ issued the *Avena* judgment. He invoked *Avena* and argued that the decision constituted binding federal law by virtue of the Supremacy Clause of the U.S. Constitution.[69] The Supreme Court decided that, while the *Avena* decision constituted an international law obligation on the part of the U.S., it did not have "automatic domestic legal effect such that the judgment of its own force applies in state and federal courts."[70] After the *Avena* decision, in 2005, the U.S. gave notice of withdrawal from the Optional Protocol.[71]

The Supreme Court recognized in *Medellin* that the U.S., as a signatory to the Optional Protocol, had agreed to submit disputes arising out of the Vienna Convention to the ICJ.[72] However, the Supreme Court determined that the Optional Protocol does not mention anything regarding the effect of an ICJ judgment within the jurisdiction of the signatory states.[73] The Supreme Court further interpreted article 94 of the UN Charter[74] as reflecting "a commitment on the part of UN members to take future action through their political branches to comply with an ICJ decision."[75] Therefore, the Supreme Court concluded that this language does not reflect that ICJ judgments are self-executing.[76]

Furthermore, in *Medellin*, the Supreme Court reaffirmed *Foster's* interpretation: "[given] our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look

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[67] Vienna Convention on Consular Relations, *supra* note 62, at art. 36(b).

[68] Medellin v. Texas, 552 U.S. 491, 503 (2008) (citation omitted).

[69] *Id*. at 502, 504.

> Medellin first contends that the ICJ's judgment in *Avena* constitutes a 'binding' obligation on the state and federal courts of the United States. He argues that 'by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are *already* the 'Law of the Land' by which all state and federal courts in this country are 'bound. *Id.* at 504.

[70] *Id.* at 504, 507.

[71] *Id.* at 500.

[72] *Id.* at 507.

[73] *Id.* at 507-08.

[74] Article 94 of the UN Charter mandates that UN members undertake to comply with ICJ judgments in any case in which it is a party. United Nations Charter, art. 94, Jun. 26, 1945, 59 Stat. 1033, 1 U.N.T.S. XVI.

[75] *Id.* at 508.

[76] *See Id.*

to the treaty language to see what it has to say about the issue."[77] In addition, it confirmed prior cases which held that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[78] Finally, the Supreme Court concluded that treaties are self-executing only "when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect."[79]

However, although the President of the U.S. agreed that *Avena* was self-executing, the Supreme Court manifested that he does not have the power to convert a non-self-executing treaty into a self-executing one; that that decision lies with Congress. [80] If the President "determines that a treaty should have domestic effect of its own force,"[81] such determination must be implemented when the treaty is drafted, so that its language conveys domestic enforceability.[82] The President "may not rely upon a non-self-executing treaty to 'establish binding rules of decisions that preempt contrary state law'."[83]

In summary, although treaties are part of the *Supreme Law of the Land*,[84] and international law, in general, is part of U.S. law,[85] the U.S. retreated from its international obligations with the Supreme Court's judicial invention of the self-executing treaty doctrine. Nonetheless, this doctrine was compatible with international law in the nineteenth century, where the subject of international law was merely sovereign states –not individuals.[86] What happened within a sovereign state's jurisdiction *as to its own nationals* was not a concern of international law "since [at that time] no state could be expected to bring an action against itself."[87]

IV. International Law after WWII: The Protection of Human Rights

During WWII, the need for creating an international organization to promote collective security and co-operation between sovereign states in social and

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[77] *Id.* at 514.

[78] *Id.* at 517 (*citing* Sanchez-Llamas v. Oregon, 548 U.S. 331, 351 (2006)).

[79] *Id.* at 519.

[80] *Id.* at 525. This conclusion is reached in light of a memorandum that the President submitted expressing that the *Avena* Judgment is, indeed, self-executing.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 528.

[84] U.S. CONST. art. VI, cl. 2.

[85] *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (expressing that "International Law is part of [the laws of the United States], and must be ascertained and administered by the courts of justice of appropriate jurisdiction. . . .").

[86] *See* DUNOFF ET AL, *supra*, note 3, at 403.

[87] *Id.* at 404.

economic matters became apparent.[88] Specifically, in light of the atrocities committed in WWII, the importance of protecting human rights arose.[89] To fulfill and guarantee such protection, the UN and other regional organs emerged.[90] The UN Charter –the UN's constituent instrument[91]– was ratified in 1945.[92]

"The UN Charter explicitly drew a connection between human well-being and international peace . . . and committed the organization to promote universal respect for, and observance of, human rights and fundamental freedoms without discrimination –'for all'."[93] For example, article 1 of the UN Charter reflects that the UN's purpose is "[t]o maintain international peace and security; . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and the self-determination of the peoples; . . . [t]o achieve international co-operation"[94] regarding "economic, social, cultural [and] humanitarian [issues],"[95] and to promote the protection of "human rights and fundamental freedoms without distinction as to race, sex, language or religion."[96] Thus, the UN Charter –which is the constituent instrument of the UN– proves that the role of international law shifted to the protection of human rights after 1945.

A. Shift in Focus to Human Rights Protection

With a shift in focus to the protection of human rights as the main role of international law post-WWII, the UN General Assembly adopted the Universal Declaration of Human Rights (hereafter, *UDHR*).[97] The UDHR is the first document to formally list fundamental human rights that are to be considered as universal and inviolable.[98] Although the UDHR is not legally binding on states, it is "considered to be the most widely accepted international human rights instrument."[99]

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[88] BENEDETTO CONFORTI & CARLO FOCARELLI, THE LAW AND PRACTICE OF THE UNITED NATIONS 1 (4th ed. 2010). This need was reflected in the Atlantic Charter, a declaration signed in Washington DC in 1942. This to achieve international coster and President Roosevelt int 1942gion.o promoten of the peoples, to achieve international co

[89] DAVIS, *supra* note 4, at 14.

[90] *See Id.*

[91] *See Id.* at 14-15.

[92] *Id.*

[93] DAVIS, *supra* note 4, at 47.

[94] UN Charter art. 1, ¶ 1-2.

[95] UN Charter art. 1, ¶ 3.

[96] UN Charter art. 1, ¶ 3. For mor Convention on Human Riher of the American Convention.the treaty, but also the interpretation thereof made by the Inter-

[97] *See* DAVIS, *supra* note 4, at 5 (*citing* LOUIS HENKIN, THE AGE OF RIGHTS 1-5 (1990)).

[98] *Id.*

[99] *Id.*

The UN created international human rights institutions, also known as Charter-Based bodies.[100] Among these is the Human Rights Council and other entities that fall under the Office of the High Commissioner for Human Rights.[101] There are other UN institutions that have been established through the adoption and ratification of international human rights treaties, also known as the treaty-based bodies.[102] These treaty-based bodies are the ones in charge of monitoring states' compliance with human rights treaties that it has signed and ratified.[103]

There are currently nine UN treaties that are in force to protect and promote human rights:[104] the International Covenant on Economic, Social and Cultural Rights (hereafter, *ICESCR*); the International Covenant on Civil and Political Rights (hereafter, *ICCPR*); the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter, *ICERD*); the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (hereafter, *CAT*); Convention on the Elimination of the Discrimination against Women (hereafter, *CEDAW*); the Convention on the Rights of the Child (hereafter, *CRC*); the Convention on the Rights of Persons with Disabilities (hereafter, *CRPD*); the International Convention for the Protection of All Persons from Enforced Disappearance (hereafter, *ICPPED*); and the International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families. (hereafter, *ICMW*).

Besides the UN, there are regional agencies, such as the Organization of American States (hereafter, *OAS*).[105] The OAS facilitates multilateral cooperation and discussion among the countries in America, including the protection of human rights.[106] The OAS promotes democracy, "protects human rights and confronts problems such as terrorism, poverty, corruption, and the illegal trade in drugs."[107] It has two mechanisms to advance the protection of human rights: the Inter-American Commission on Human Rights (hereafter, *Inter-American Commission*) which is based in Washington, DC; and the Inter-American Court of Human Rights

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[100] DAVIS, *supra* note 4, at 47-48.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 49.

[104] *Id.* at 21.

[105] For purposes of this section, this part will only focus in UN and the OAS as the U.S. is a member of both. However, there are many regional organizations that have as one of their main purposes the protection of human rights, such as the African Commission on Human and Peoples' Rights, the Asian Human Rights Commission, and the Council of Europe. For information regarding these organizations.

[106] *See* OAS Charter, arts. 2, 3(l).

[107] DAVIS, *supra* note 4, at 49.

(hereafter, *Inter-American Court*) which is based in San Jose, Costa Rica.[108]

All OAS member countries are bound by the provisions of the American Declaration of the Rights and Duties of Man placing them under the jurisdiction of the Inter-American Commission.[109] The Commission was "created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter."[110] It "investigates complaints of human rights violations, and monitors the general human rights situation in the countries of the Americas."[111] Moreover, it has the power of developing "an awareness of human rights among the peoples of the Americas" with respect to the members of the OAS.[112] However, it does not enact legally binding judgments; rather, it makes recommendations to OAS members on how to deal with a human rights violation situation within their jurisdiction.[113]

The OAS has another fundamental instrument that protects human rights known as the American Convention on Human Rights, which places all its ratifying-members under the jurisdiction of the Inter-American Court.[114] Different from the Inter-American Commission, the Inter-American Court, as a judicial institution,[115] enacts legally binding judgments on human rights violations,[116] after the Commission sees the case and refers it to the Court.[117] Entities such as the Inter-American Court and the Inter-American Commission were created to ensure States' compliance with human rights law within their jurisdictions.[118]

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[108] *Id.*

[109] DAVIS, *supra* note 4, at 50.

[110] Statute of the Inter-American Commission on Human Rights, art. 1(1), Oct. 1, 1979, O.A.S. Res. 447 (IX-0/79), OEA/Ser.P/IX.02/80.

[111] DAVIS, *supra* note 4, at 50.

[112] Statute of the Inter-American Commission on Human Rights, art. 18(a), Oct. 1, 1979, O.A.S. Res. 447 (IX-0/79), OEA/Ser.P/IX.02/80.

[113] *See Id.*, art. 18(b); *see also*, DAVIS, *supra* note 4, at pg. 50.

[114] OAS, American Convention on Human Rights, art. 62 Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[115] Art. 1, Statute of the Inter-American Court. Statute of the Inter-American Court, art. 1, Oct. 1, 1979, O.A.S. Res. 448

[116] OAS, American Convention on Human Rights, art. 62, 63, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[117] Statute of the Inter-American Commission on Human Rights, art. 19, Oct. 1, 1979, O.A.S. Res. 447 (IX-0/79), OEA/Ser.P/IX.02/80.; OAS, American Convention on Human Rights, art. 48 Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. "The Inter-American Commission on Human Rights shall appear as a party before the Court in all cases within the jurisdiction of the Court pursuant to Article 2(a) of the [Statute of the Inter-American Court]."

[118] *See* for example OAS Statute of the Inter-American Commission on Human Rights, arts. 18, 19, Oct. 1, 1979, OEA/Ser.P/IX.0.2/80.

B. Domestic Incorporation of Human Rights International Law

As a consequence of the shift in focus in international law after 1945, many cases have been brought to the international and regional organs mentioned above to enforce human rights protection. These organs issue reports, advisory opinions, resolutions, and judgments as to the lack of human rights protection within a jurisdiction, with a set of recommendations or orders that the concerned state should follow. As such, the next subsection will mention some examples of expressions made by international organs as to the domestic character of human rights law.

i. International Organs

As explained in the previous section, the shift in focus of international law to the protection of human rights gave way to the creation of many international and regional organizations. These organs give advisory opinions, resolutions and judgments regarding the importance of the protection of human rights domestically.

For instance, in *Velázquez Rodríguez v. Honduras*,[119] the Inter-American Court emphasized that "human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State."[120] Furthermore, it stated the following:

> The protection of human rights, particularly the civil and political rights set forth in the [American] Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. There are individual domains that are beyond the reach of the State or to which the State has but limited access. Thus, *the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power*.[121]

As to the importance of protecting human rights, although the American Declaration on the Rights and Duties of Man is not a Convention nor a Treaty, the Inter-American Commission has expressed that such instrument has been "recognized as constituting a source of legal obligation for OAS member parties, including those States that are not parties to the American Convention on Human

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[119] Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 165 (Jul. 29, 1988).

[120] *Id.*

[121] *Id.* (*citing* The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 21) (emphasis added).

Rights."[122] As a matter of fact, the Commission has emphasized that besides respecting human rights set forth in instruments such as the American Declaration, states have to ensure individuals *within* their jurisdictions the exercise of such rights.[123] Moreover, the Inter-American Commission expressed that "the continuum of human rights obligations is not only negative in nature; it also requires positive action from States."[124]

Because human rights' treaties' purpose is to protect individuals from States, and thus to ensure compliance with human rights law *domestically*, the Inter-American Court created the "conventionality control" doctrine. This is a doctrine that provides that judges and domestic courts of the signatory states to the American Convention of Human Rights are bound by its provisions.[125] Therefore, they have the responsibility of ensuring that their judgments and the internal legislation comply with the American Convention on Human Rights and the interpretation that the Inter-American Court has given to it.[126] The Inter-American Court has explained this doctrine as follows:

> But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. On other words, the judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[127]

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[122] Lehanan v. U.S., Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.128, ¶ 115 (2011).

[123] *Id.* at ¶ 117. (emphasis added).

[124] *Id.*

[125] For mor Convention on Human Riher of the American Convention.the treaty, but also the interpretation thereof made by the Inter-Almonacid Arellano, et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept 26, 2006).

[126] *Id.*

[127] *Id.* For a more thorough explanation on the "conventionality control" doctrine *see* of Boyce *et al.* v. Barbados, Preliminary Objections, Merits, Reparations and Costs, Judgments Inter-Am. Ct. ¶ 77-80 (Nov. 20, 2007); Case of Cabrera García and Montiel Flores v. Mexico, Preliminary Objections,

As the fundamental purpose of human rights treaties is to protect human rights in front of the state, and thus for them to be domestically enforceable, the UN has created several mechanisms to pursue such motive. For instance, the UN created human rights treaty bodies –committees of independent experts that monitor compliance and *implementation* of the nine core international human rights treaties within the States-Parties' jurisdiction.[128] Also, the UN's Human Rights Council has the central element of the UN's human rights machinery: Special Procedures –"independent human rights experts with mandates to report and advise on human rights from a thematic or country–specific perspective."[129] These "Special Procedures" are either an individual called "Special Rapporteur" or a working group of five members, which among other duties, undertake country visits to evaluate human rights situation within that jurisdiction.[130]

The European Union (hereafter, *EU*) also recognizes that the protection of human rights is one of the fundamental concerns of international and regional organs. As such, the EU has three sources of fundamental rights: (1) Fundamental rights from the constitutional traditions of Member States; (2) The European Convention on Human Rights; and (3) The Charter of Fundamental Rights.[131] Under European Law, National Courts are obliged to review the legality of national law in light of EU fundamental rights.[132] As a matter of fact, fundamental human rights as guaranteed by the three sources of such rights are general principles of EU law.[133] Furthermore, State Members to the EU are bound by the EU Charter of Fundamental Rights, when implementing EU Law.[134]

As a reminder, after the atrocities committed in WWII –for example, the mass killing of the Jews, a human rights violation–many international and regional organs emerged to, among other reasons, protect people from their own governments. As such, international and regional organs have taken measures in response to this imperative task, and thus, ensuring human rights protection within States' jurisdictions.

Merits, Reparations and Costs, ¶ 225, 233, (Nov. 26, 2010); Agua Alfaro *et al.* v. Perú, Preliminary Objections, Merits, Reparations and Costs, ¶ 128 (Nov. 24, 20016); Case Gelman v. Uruguay, Merits and Reparations, ¶ 193, 239 (Feb. 24, 2011).

[128] UN Human Rights, Office of the High Commissioner. Available at: https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx (last visit Oct. 6, 2019).

See subsection (A) of this section for a list of such nine-core international human rights treaties.

[129] UN Human Rights, Office of the High Commissioner, Special Procedures. Available at: https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx (last visit Oct. 6, 2019).

[130] UN Human Rights, Office of the High Commissioner, Special Procedures. Available at: https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx.

(last visit Oct. 6, 2019).

[131] ROBERT SCHÜTZE, EUROPEAN UNION LAW, 430 (2015).

[132] *Id.* at 431.

ii. Sovereign States

Besides international organs, there are several sovereign states[135] that have recognized the protection of human rights as one of the fundamental purposes of the contemporaneous role of international law. For purposes of this article, this subsection will only discuss human rights law incorporation within Spain and Argentina.

Spain has given human rights a constitutional standing. For instance, Spain's Constitution expresses that the constitutional norms respecting fundamental rights and freedoms will be interpreted in conformity with the UDHR and human rights treaties in which Spain is a party.[136] Article 94(1)(c) of Spain's Constitution emphasizes that the Parliament has to give its consent when Spain binds itself to a treaty that affects the fundamental rights guaranteed in Title I of Spain's Constitution – Art. 10(2), which is within Title I, mandates that norms referring to fundamental rights will be interpreted according to the UDHR and fundamental rights treaties that Spain is a party.[137] As to the domestic effect of binding treaties, Spain's constitution manifests that valid treaties will be part of the municipal law of Spain.[138]

The Constitutional Court of Spain has expressed that although foreign courts are not bound by Spain's Constitution, Spanish courts cannot execute foreign resolutions and judgments, if such resolutions and judgments injure fundamental rights guaranteed by Spain's Constitution.[139] It reiterated that Spain's Judicial Branch's duty of safeguarding fundamental rights does not cease when executing foreign judgments or resolutions.[140] Also, it specified that Spain's Constitution safeguards those rights that people *own as humans* rather than citizens.[141] It reaffirmed that, according to Art. 10(2) of Spain's Constitution, these *universal essential* rights have to be interpreted in accordance with the UDHR and international human rights treaties that Spain is a party.[142] Also, these universal essential rights have to be interpreted according to the European Convention for the

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[133] *See* Art. 6(3) of the Treaty on European Union, art. 6(3), Feb. 7, 1992, C/ 325/5.

[134] *See Id*, art. 51(1).

[135] *See* note 1 for the definition of a Sovereign State under the Montevideo Convention.

[136] Art. 10(2), C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain).

[137] Art. 94(1)(c), C.E., B.O.E., n. 311, Dec. 29, 1978 (Spain).

[138] Art. 96, C.E., B.O.E., n. 311, DEC. 29, 1978 (Spain).

[139] S.T.C., May 4, 2000, B.O.E., n. 107, 2000, 99, 109 at ¶ 8 (Spain).

[140] *Id.* at 106, ¶ 6.

[141] *Id*. at 107, ¶ 7.

[142] *Id.*

Protection of Human Rights, and, specifically, the interpretation that the European Court of Human Rights has given to such convention.[143] Furthermore, Spain's Constitutional Court explained that Art. 10(2) of Spain's Constitution expresses Spain's will of incorporating the international legal order's purpose of defending and protecting human rights as the fundamental base for the organization of a State.[144] As such, it concluded that when Spain's Judicial Branch equates foreign resolutions or judgments that harm fundamental universal rights, it is infringing Spain's Constitution.[145]

Another Sovereign State that recognizes human rights law as a fundamental component of their internal laws is Argentina. Although in the case of *Ekmekdjian*, Argentina's Supreme Court of Justice emphasized that an international agreement that is binding on Argentina is going to be self-executing depending on the language that said agreement conveys,[146] the dissenting opinion expressed that that norm should not apply when it comes to human rights treaties.[147]

The dissenting opinion explained that human rights treaties are not the same as other international agreements.[148] It emphasized that human rights treaties' recipients are not States; rather, the people that live within their territories.[149] Thus, by binding themselves to a human rights treaty, States assume several obligations as to individuals under their jurisdiction, rather than States.[150] The dissenting opinion expressed that human rights law is international law's central axiom.[151]

However, after *Ekmekdijan*, in 1994, Argentina elevated several human rights instruments, treaties, and conventions to constitutional standing.[152] Nevertheless, for other international human rights agreements –that Argentina was not a party in 1994– to have constitutional standing, it is necessary the consent of two thirds of the Legislature.[153]

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[143] *Id.*

[144] *Id.*

[145] *Id.* at 108, ¶ 8.

[146] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 07/07/1992, "Ekmekdjian c/ Sofovich", Fallos 315:1492-¶15 (Arg.)

[147] *Id.* Dissident Opinion by Justices Enrique Santiado Petracchi and Eduardo Moliné O'Connor at ¶ 14.

[148] *Id.*

[149] *Id.*

[150] *Id.* at ¶ 15.

[151] *Id.*

[152] *See* Art. 75(22), CONST. NAC. (Arg.). Among the international instruments elevated to constitutional standing are the ICCPR, the UDHR, the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, the ICERD, and the CAT.

[153] *See* Art. 75(22), CONST. NAC. (Arg.).

After Argentina's 1994 constitutional amendment, Argentina's Supreme Court had before it the case of *Simón, J.H.*[154] In that case, Argentina's Supreme Court declared unconstitutional the Amnesty Laws[155] as they were contrary to human rights principles contained in the ICCPR and the American Convention of Human Rights –which were elevated to constitutional standing in the 1994 constitutional amendment. The Supreme Court expressed that the Amnesty Laws presented an obstacle for Argentina to comply with the ICCPR and the American Convention as to the States' obligation of prosecuting crimes against humanity.[156] To declare unconstitutional the Amnesty Laws, the Court relied on the Inter-American Commission and the Inter-American Court's interpretation of the States' obligations of safeguarding human rights within its jurisdiction as mandated by art. 1 of the American Convention of Human Rights.[157]

As shown, there are sovereign States that have recognized human rights law as a fundamental element of international law. Also, there are sovereign States that acknowledge that obligations imposed on States by human rights treaties are distinct from other international agreements, and as such, have taken internal measures to ensure human rights protection within their jurisdiction. This is important as, contrary to the U.S., it is a recognition by States of the necessity of human rights law being domestically enforceable.

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[154] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/14/05, "Simón, J.H. y otros c/ privación ilegítima de la libertad, etc. causa Nº 17.768 (2001) (Arg.)

[155] An amnesty law is "[a]n extraordinary legal measure whose primary function is to remove prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law." Louise Mallinder, *Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States*, 14 OR. REV. INT'L L. 307, 320 (2012) (*quoting* MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 13 (2009).

[156] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/14/05, "Simón, J.H. y otros c/ privación ilegítima de la libertad, etc. causa Nº 17.768 (2001-8, 9, 10) (Arg.)

[157] *See Id.* at 6-7.

Art. 1 of the American Convention of Human Rights says:

> The State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic Status, birth, or any other social condition. OAS, American Convention on Human Rights, art. 1 Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

iii. The United States

Contrary to several states' internal modifications to make human rights treaties domestically enforceable, the U.S., besides ratifying human rights treaties with a non-self-executing declaration, it is member to only a few human rights treaties. For instance, from the nine UN human rights treaties, the United States has signed and ratified: the ICCPR, the ICERD, CAT.[158] Also, the U.S., as a member of the OAS, is bound by the American Declaration on Human Rights. However, it has not ratified the American Convention on the Rights and Duties of Man.[159]

Despite U.S.'s reluctance to incorporate human rights treaties domestically, many judges at different levels, have evaded the self-executing treaty doctrine and complied with international human rights law by resorting to other international law sources. For example, in *Roper v. Simmons*,[160] the U.S. Supreme Court resorted to the customs of other sovereign states and human rights treaties to abolish the death penalty sentence on juveniles younger than 18 years old by declaring such practice unconstitutional –it was in violation of the Eight Amendment prohibition against "cruel and unusual punishment."[161] It expressed that the Court "has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eight Amendment's prohibition of 'cruel and unusual punishments.'"[162] It resorted to the treaties that the U.S. is not part of, such as the UN Convention on the Rights of the Child, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child.[163] The Supreme Court realized that the U.S. was alone in the world in practicing death penalty on juveniles under the age of 18.[164] Thus, –I consider– implicitly acknowledging the legitimacy of protecting human rights and a reminder that the U.S., as a role model in this area, has to abide to human rights norms.

Five years later, in *Graham v. Florida*,[165] the Supreme Court held unconstitutional life without parole sentences applied to juveniles who did not commit homicide, because it violated the Eight Amendment's prohibition on cruel punishment. Again, the Supreme Court acknowledged that the U.S. was alone in the world as to

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[158] Davis, *supra* note 4, at 50.

[159] *See* Status of American Convention on Human Rights. Available at: https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visit Oct. 7, 2019).

[160] 543 U.S. 551 (2005).

[161] *Id.* at 578.

[162] *Id*. at 575.

[163] *Id*. at 576 (*citing* UN Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990)).

[164] *Id.*

[165] 560 U.S. 48 (2010).

the practice of sentencing a juvenile for life without parole. The Court expressed: "[t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eight Amendment. But 'the climate of international opinion concerning the acceptability of a particular punishment' is also, 'not irrelevant'.[166] It considered the UN Convention on the Rights of the Child and the customs of the international community to conclude that life without parole for nonhomicide offenses committed by juveniles is unconstitutional.[167]

The Court rejected that this determination answered whether international law prohibits the U.S. from imposing the sentence at issue.[168] However, it emphasized that what is to be considered is whether the judgments of the rest of the world's nations declare that the sentencing practice at issue is "inconsistent with basic principles of decency."[169] If it is, the Court should respect that and adopt the norm.[170] That expression is, perhaps inadvertently, referring to two of the fundamental sources of international law –customary international law, which "results from a general and consistent practice of states followed by them from a sense of legal obligation,"[171] and general principles of law common to the major legal systems of the world.[172] Implicitly, in *Graham,* the Supreme Court recognized that life without parole sentence for nonhomicide offenses committed by juveniles is unconstitutional based on customary international law, general principles of law, and human rights law.

Another essential case as to the protection of human rights within the U.S. is *Filártiga v. Peña-Irala*,[173] a revolutionary case decided in 1980 by the Second Circuit. In this case, the Second Circuit determined that "torture perpetrated under color of official authority violated *universally* accepted norms of international law of human rights regardless of the nationality of the parties."[174] It determined that even if the human rights violation did not occur within the jurisdiction of the U.S., if the torturer is found within the borders of the U.S., the *Alien Tort Statute*[175] provides federal jurisdiction to prosecute the individual.[176] Therefore, it is another recognition of the legitimacy of the protection of human rights.

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[166] *Id.* at 80.

[167] *See Id*. at 81.

[168] *Id.*

[169] *Id.*

[170] *See Id.*

[171] RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 102(2) (AM. LAW. INST. 1987).

[172] *Id*. at § 102(1)(a).

[173] 630 F.2d 876 (2nd Cir. 1980).

[174] *Id.* at 878. (emphasis added).

[175] 28 U.S.C. § 1350 (1789).

[176] *Filártiga*, 630 F.2d at 878.

It also said that even in the absence of a congressional enactment, U.S. courts are bound by international law, which is part of the laws of the land.[177] Finally, in *Filártiga* the Second Circuit expressed that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world *today*."[178]

The selected cases described above evidence that within the U.S. there are many judges that acknowledge the fundamental purpose of the role of international law after WWII: the protection of human rights. As such, despite the self-executing treaty doctrine, U.S. and state courts are seeking ways to apply international human rights norms by recurring to other international law sources such as customary international law. However, this is not enough to guarantee a full protection of human rights norms. Human rights treaties, because of their nature are meant to be invoked in domestic courts by individuals whenever their protected human rights are being violated or threatened.

V. Human rights treaties are self-executing

Thus far, this article has demonstrated that, after WWII, the protection of human rights is the fundamental purpose of international law. As a consequence of this shift in focus, what is happening within a State's jurisdiction as to human rights violations is a concern of the UN and other international and regional organs.[179] Therefore, different from international law prior to WWII, the current role involves checking whether sovereign States are complying with human rights treaties that they are part of, as to the protection of individuals within their territory and subject to their jurisdiction.[180] As the dissident opinion recognized in the case of *Ekmekdjian* discussed above, human rights treaties are not the same as other international agreements.[181] Human rights treaties' recipients are not States; but rather, *the people that live within their territories*.[182] Thus, by binding themselves to a human rights treaty, states assume several international obligations as to individuals under their jurisdiction.[183]

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[177] *Id.* at 887 (*citing* The Nereide, 13 U.S. 388 (1815)).

[178] *Id.* at 881 (emphasis added).

[179] *See* Lehanan v. U.S., Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, (2011).

[180] *See* CARTER *supra*, note 8 at 744-45.

[181] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice: highest court on constitutional and federal matters], 07/07/1992, "Ekmekdjian c/ Sofovich", Fallos [Fallos 315:1492] (Arg.) ¶14.

[182] *Id.* (emphasis added).

[183] *Id.*at 15.

A. The Convention of Vienna on the Laws of Treaties

The UDHR is not a legally binding treaty.[184] Therefore, the U.N. and other regional entities created legally binding treaties to protect human rights within the territory and jurisdiction of the signatory States, that encompass the rights set forth in the UDHR.[185] According to the Vienna Convention on the Laws of Treaties, a treaty is "an international agreement concluded between States . . . ."[186] where each State binds itself to comply with its provisions.[187] Although the U.S. signed the Vienna Convention on the Laws of Treaties, it has not ratified such international agreement. However, the Vienna Convention on the Laws of Treaties "is an authoritative guide to the customary international law of treaties, insofar as it reflects actual state practices."[188] This means that the Convention only codified existing customary international law.[189] As the U.S. Supreme Court expressed in *The Paquete Habana*,[190] international law, specifically customary international law, is part of the laws of the U.S. and "must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . ."[191] Therefore, through customary international law,[192] the U.S. is bound by the Vienna Convention on the Laws of Treaties.

The Vienna Convention on the Laws of Treaties states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[193] This provision reflects the fundamental and widely accepted rule of *pacta sunt servanda*.[194] This rule is probably the most important principle of international

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[184] DAVIS, *supra* note 4, at 14.

[185] *See Id.*

[186] Vienna Convention on the Laws of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331.

[187] *See Id.* arts. 11, 14.

[188] *See* Mora v. New York, 524 F.3d 183, 196 n. 19 (2nd Cir. 2008).

[189] *See* CARTER, *supra* note 8, at 129.

[190] 175 U.S. 677 (1900).

[191] *Id.* at 700.

[192] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 102(2) (AM. LAW. INST. 1987). Until recently, the main international source was Customary International Law. CARTER, *supra* note 8, at 115. However, in many occasions, treaties codify and crystalize customary international law. *Id.* at 116. When a state is not party to a treaty, it is not bound by it. Nevertheless, customary international law retains independent force and it binds even those states that are not parties to the treaty that codified the custom. *Id.*

[193] Vienna Convention on the Laws of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

[194] *See* CARTER, *supra* note 8, at 95. In international law, *pacta sunt servanda* refers to the binding force of international agreements upon the parties. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 321 (AM. LAW. INST. 1987), and its comments.

law as it lies at the core of international agreements and international relations.[195] As such, corollary to the *pacta sunt servanda* principle, the Vienna Convention on the Law of Treaties states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,"[196] and escape international responsibility.[197] Nevertheless, the *pacta sunt servanda* principle is subject to "the rules concerning the validity and termination of treaties,"[198] such as reservations.

The Vienna Convention on the Laws of Treaties establishes that States can make a reservation in the treaty-making process, negotiation, or adherence.[199] A reservation is a "unilateral statement, *however phrased or named*, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provision of the treaty in their application to that State."[200] Finally, the Vienna Convention on the Law of Treaties expresses that a State may not attach a reservation if is incompatible with the object and purpose of the treaty.[201]

Apart from reservations, the U.S. attaches *declarations* and *understandings* when ratifying a treaty.[202] Understandings are unilateral interpretive statements that clarify or elaborate on the provisions of the treaty as to the U.S.[203] A declaration is a unilateral statement "of policy relating to the treaty that do not alter or limit its substantive provisions."[204] However, a declaration constitutes a reservation if "it purports to exclude, limit or modify [a] state's legal obligation."[205] In the U.S. *reservations*, *understandings* and *declarations*, are collectively referred to as RUDs.[206]

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[195] *See Id.* (citations omitted).

[196] Vienna Convention on the Laws of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

[197] *See* CARTER, *supra* note 8, at 96.

[198] *Id.* at 96.

[199] *See* Vienna Convention on the Laws of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331.

[200] *Id.* art. 2(1)(d) (emphasis added).

[201] *Id.*, art. 19(c).

[202] CARTER, *supra* note 8, at 181.

[203] *Id.*

[204] *Id.*

[205] George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements, or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461, 464 (2007) (*quoting* Comments to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (AM. LAW. INST. 1987)).

[206] CARTER, *supra* note 8, at 181.

i. United States' RUD's to Human Rights Treaties

The U.S. attached certain RUDs to the ICCPR with its ratification.[207] One of them was that the provisions of articles 1 through 27 of the ICCPR will be non-self-executing.[208] Those articles list all of the human rights that the ICCPR protects.[209] The U.S. made the same unilateral statement when it bound itself to the CERD.[210] If the U.S. ratifies a human rights treaty that individuals subject to its jurisdiction cannot invoke in U.S. or state courts whenever their human rights protected by such treaty are being violated, then what is the purpose of being bound by such agreement?

The purpose of human rights treaties is to demand State-parties to respect and ensure to all individuals *within their territory* the human rights recognized in such agreements.[211] Thus, if human rights treaties are meant to protect such rights *within* the territory of the signatory state, it entails having domestic effect of its own force. Consequently, according to the Vienna Convention on the Law of Treaties discussed in the previous subsection, attaching a non-self-executing declaration to a human rights treaty, goes against the purpose of such agreement, and thus, it is contrary to international law.[212] Human rights treaties, as they seek the protection of supranational *unalienable rights*, should operate of themselves without the aid of any legislative provision.

B. Human Rights Law

Human rights are universal.[213] In other words, "they belong to every human being in every human society."[214] In addition, human rights constitute *erga omnes* obligations: "obligations of [s]tate towards the international community as a whole."[215] Among other principles, human rights include liberties and freedoms

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[207] *See* Status of ICCPR, Jun. 8, 1992, 99 U.N.T.S. 171. Available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#bottom (last visit Oct. 7, 2019).

[208] *Id*.

[209] *See* ICCPR art. 1-27, Jun. 8, 1992, 99 U.N.T.S. 171.

[210] *See* Status of CERD, Jan. 4, 1969, 660 U.N.T.S. 195, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en (last visit Oct. 7, 2019).

[211] *See* ICCPR art. 2(2) Jun. 8, 1992, 99 U.N.T.S. 171. (emphasis added).

[212] *See* Vienna Convention on the Laws of Treaties, art. 19(c), May 23, 1969, 1155 U.N.T.S. 331.

[213] Davis, *supra* note 4, at 5 (citation omitted).

[214] *Id.*

[215] Case Concerning the Barcelona Traction Light and Power Co. Ltd. (Belgium v. Spain), Judgment, 1970 I.C.J. 3, ¶¶33-34 (Feb. 5).

from illegal detention, torture and crimes against humanity.[216] In addition, they include the right to food sustenance, housing and other basic human needs.[217] Human rights also encompass benefits "deemed essential for individual well-being, dignity, and fulfillment."[218] More importantly, they are not some set of abstract rights left to States to decide what rights shall be deemed human rights, or which human rights are worthy of protection within a particular jurisdiction.[219] As a matter of fact, several human rights treaties contain a provision that establishes that the signatory States may not restrict or limit the protection of human rights included in such agreements.[220]

Article 1 of the UDHR expresses that "[all] human beings are born free and equal in dignity and rights."[221] As to the universal character of human rights, article 2 of the UDHR makes clear that "[everyone] is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, political or other opinion, nationality or social origin, property, birth or other status."[222] The UDHR adds that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[223] It also establishes that everyone is equal under the law;[224] that every person has the right to an effective remedy;[225] that no one shall be subjected to arbitrary arrest;[226] that everyone has a right to freedom of expression.[227]

The UDHR was later codified into legally binding covenants such as the ICCPR and the International Covenant on Economic, Social and Cultural Rights. These two UN treaties contain a broad set of human rights. There are other UN covenants that are directed to protect specific human rights. Among these treaties are, the CERD, the Convention on the Elimination of All Forms of Discrimination Against Women, the CAT, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the UN Declaration on the Rights of

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[216] DAVIS, *supra* note 4, at 5 (citation omitted).

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *See* for example, ICCPR art. 5, Jun. 8, 1992, 99 U.N.T.S. 171.

[221] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art.1 (Dec. 10, 1948).

[222] *Id.* art. 2.

[223] *Id.*

[224] *Id* art. 7.

[225] *Id* art 8.

[226] *Id* art. 9.

[227] *Id* art. 19.

Indigenous Peoples. The codification of the UDHR into legally binding treaties proves the importance that has the protection of human rights after WWII.

C. United States as a Key Player in the Development of Human Rights Law

"The [U.S.] has played a key role in the development of modern human rights law. Further, since the nation's inception, American society and culture have been profoundly influenced by concepts of human rights."[228] After almost two centuries of being under the subjugation of the British Empire, in 1776 the U.S. signed The Declaration of Independence which expressed the following

> We hold these truths to be self-evident, that all [persons] are created equal, that they are endowed by their Creator with certain *unalienable rights*, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among [the people], deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness …The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.[229]

Furthermore, on July 4th, 1914, in order to demonstrate U.S. protection of *unalienable rights*, President Woodrow Wilson publicly stated that "America will come into the full light of the day when all shall know that she puts human rights above all other rights and her flag is the flag not only of America but of humanity."[230] On January 6, 1941, President Franklin Delano Roosevelt addressed Congress in what is commonly called "The Four Freedoms Speech".[231] In this speech, Roosevelt spoke about *fundamental freedoms* as the key to maintaining world peace. He expressed:

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[228] DAVIS, *supra* note 4, at 67.

[229] THE DECLARATION OF INDEPENDENCE ¶. 2 (U.S. 1776) (emphasis added). This portion of The Declaration of Independence shows that the U.S. was built upon fundamental freedoms and "unalienable rights" that are not susceptible to violation, and if they are violated it is the right of the people to advocate for them.

[230] PAUST, *supra* note 22, at 180 (*citing* Address of President Woodrow Wilson in Philadelphia, 3 Public Papers 147 (July 4, 1914)).

[231] *See* DAVIS, *supra* note 4, at 82.

> In the future days, which we seek to make secure, we look forward to a world founded upon four *essential human freedoms*. The first is freedom of speech and expression –everywhere in the world. The second is freedom of every person to worship God in his own way –everywhere in the world. The third is freedom from want –which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants –everywhere in the world. The fourth is freedom from fear –which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor –anywhere in the world. That is no vision of a distant millennium. It is a definite basis from a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb…*Freedom means the supremacy of human rights everywhere.* Our support goes to those who struggle to gain those rights or keep them . . . .[232]

The *Four Freedoms Speech* by President Roosevelt was the first articulated norm to guide nations "in the realm of human rights."[233] These principles were embodied and universalized in the Atlantic Charter,[234] a joint declaration made by President Roosevelt and Prime Minister Winston Churchill in 1941. It "manifested the common principles on which both countries based 'their hopes for a better future of the world.'"[235] These principles were

> 1) [The U.S. and Great Britain] seek no aggrandizement, territorial or other; 2) [The U.S. and Great Britain] desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; 3) [The U.S. and Great Britain] respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them; 4) [The U.S. and Great Britain] will endeavor, with due respect for their existing obligations, to

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[232] DAVIS, *supra* note 4, at 82 (*citing* Annual Message to Congress by Franklin D. Roosevelt: The Four Freedoms Speech (Jan. 6, 1941) (emphasis added).

[233] Edward A. Laing, *The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism*, 26 WILLIAMETTE L. REV. 113, 114 (1989).

[234] *Id*. at 118.

[235] *Id.* (*citing* Atlantic Charter, Aug. 14, 1941, 55 Stat. 1603, E.A.S. No. 236).

> further the enjoyment of all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity; 5) [The U.S. and Great Britain] desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security; 6) *After the final destruction of the Nazi tyranny*, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want; 7) Such a peace should enable all men to traverse the high seas and oceans without hindrance; 8) [The U.S. and Great Britain] believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security that the disarmament of such nations is essential . . . .[236]

The Atlantic Charter was later embodied in the Declaration by United Nations, which was signed by the U.S., Great Britain, the Soviet Union and China on January 1, 1942.[237] This declaration's crucial objective was to "reiterate the 'common programme of purposes and principles . . . known as the Atlantic Charter'."[238] By 1945, this Declaration was signed by forty-three other countries.[239] As Roosevelt's speech influenced the Atlantic Charter, which was adopted by the Declaration of the United Nations in 1942, such speech played a key role in the development of the goal established by the UN to protect human rights.

Further, in 1947, the Commission on Human Rights, chaired by Eleanor Roosevelt, drafted the UDHR and incorporated the Atlantic Charter into its text.[240] Then, in 1948, the Declaration was adopted in its entirety. It reflected President Roosevelt's thoughts on the primacy of human rights.[241] For instance, article 21 of the UDHR manifests that "[e]veryone has a right to take part in the government of

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[236] *Id.* at 119.

[237] *Id.* at 123.

[238] *Id.* (*citing* Declaration by United Nations, Jan. 1, 1942, 55 Stat. 1600, E.A.S. No. 236, 204 L.N.T.S. 382) (The omissions were done by the author.).

[239] *Id.* at pg. 124.

[240] *Id.* at pg. 141.

[241] *See Id.*

his country, directly or through freely chosen representatives,"[242] adopting the 2nd principle of the Atlantic Charter, which recognizes the right of the people to choose how they want to be ruled. Articles 22 and 25 of the UDHR ratify the fifth principle of the Atlantic Charter, through the recognition of the right to social security.[243] Also, the UDHR incorporated provisions of the *Four Freedoms Speech* that the Atlantic Charter did not have. For example, article 18 of the UDHR manifests that everyone has a right to freedom of thought, conscience and religion,[244] adopting President Roosevelt's view from the speech that freedom to worship is essential to be free. Article 19 of the UDHR deems freedom of expression a human right,[245] universalizing the first freedom expressed by President Roosevelt.

As the *First Freedoms Speech* influenced the Atlantic Charter and later on the UDHR, it is only logical to conclude that the U.S. played a key role in the development of human rights law. As a leading country in this matter, it is inconceivable that it has declared ratified human rights treaties to be non-self-executing. This goes against its Constitution, its Declaration of Independence, the purpose of human rights treaties, and the role of international law post WWII.

D. Incompatibility of Non-Self-Executing Treaty Doctrine with Human Rights Treaties

As proven, human rights treaties are incompatible with the non-self-executing treaty doctrine. Therefore, they should have direct application within the U.S. As explained in the previous sections, human rights treaties' purpose is to protect human rights within a jurisdiction. For example, art. 2(1) of the ICCPR says: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the Present Covenant."[246] In addition, art. (2)(3)(a)-(c) states:

> Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity; (b) to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by

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[242] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 21 (Dec. 10, 1948).

[243] *Id.* art. 22, 25.

[244] *Id.*, art. 18.

[245] *Id.*, art. 19.

[246] ICCPR art. 2(1) Jun. 8, 1992, 99 U.N.T.S. 171 (emphasis added).

> any other competent authority provided for by legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies granted.[247]

As the ICCPR shows, the purpose of such covenant , and human rights treaties in general, is to demand State-parties to respect and ensure to all individuals *within their territory* the human rights recognized in such agreements.[248] Thus, if human rights treaties are meant to protect such rights *within* the territory of the signatory State, it is to have domestic effect of its own force. This is particularly true under the U.S. Constitutional structure which provides that treaties, after negotiated by the Executive and consented by two thirds of the Senate,[249] are to be part of the "Supreme Laws of the Land."[250] Therefore, in accordance with the U.S. Supreme Court's words in *Owings v. Norwood's Lessee* that "…whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected".[251] With the incidental effect of charter-based bodies of monitoring what happens within a jurisdiction respecting the protection of human rights, and the *supreme* character that the U.S. Constitution grants to treaties, human rights treaties are not subject to the non-self-executing treaty doctrine. Human rights treaties, as they seek the protection of supranational *unalienable rights*, should operate of themselves without the aid of any legislative provision.

One of the main purposes for which the UN was created was the prevention of a scenario like the one of WWII and violations like those perpetrated against the Jewish people's human rights.[252] Thus, the instruments built to protect human rights were made to ensure that such inalienable rights are protected *within* a jurisdiction, and prevent another tragedy such as the Holocaust.[253] Therefore the effect of these treaties' purpose is to have domestic effect: to be self-executing.[254]

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[247] *Id.* art. 2(3)(a)-(c).

[248] *See Id.* art. 2(2) (emphasis added).

[249] U.S. CONST. art. II, § 2, cl. 2.

[250] U.S. CONST. art. VI, cl. 2.

[251] Owings v. Norwood's Lessee, 9 U.S. 344, 348 (1809).

[252] *See* DUNOFF, *supra*, note 3, at 404-05.

[253] *Id.*

[254] An important matter that should be noted is that human rights covenants, such as the ICCPR, have a provision that may be confusing because it conveys that the State Parties have to give domestic effect to the Covenant. For instance, art. (2)(2) of the ICCPR says:

> Where not already provided for by *existing legislative or other measures*, each State Party to the present Covenant undertakes to take the necessary steps, *in accordance with its constitutional processes* and with the provisions of the

VI. Conclusion

This article proposed that the non-self-executing treaty doctrine is incompatible with the purpose of human rights treaties for several reasons. First of all, the non-self-executing treaty doctrine was invented in the nineteenth century where the only subject of international law was the sovereign state. What happened within a jurisdiction was not a concern of international law in that period. However, after WWII the role of international law shifted to the protection of human rights as a means to maintain world peace, and thus, the individual became a subject of international law as to human rights violations. With such a shift, the UN created legally binding human rights treaties. These treaties demand state parties to protect human rights as to the people subject to their jurisdiction and within their territory. Thus, they involve monitoring human rights law compliance within a jurisdiction. As a consequence, human rights treaties' purpose entails having effect domestically.

As a recognition that the protection of human rights is one of the fundamental purposes of the UN, and international law after WWII, other sovereign states have given constitutional standing to human rights. Also, many international organs have been created around the world to monitor sovereign states' compliance with human rights law. In addition, within the U.S., judges have acknowledged that human rights protection is the key to maintain world peace and thus, the role of the UN, by recurring to diverse international sources to grant human rights protection domestically. In sum, international organs, other sovereign states, and many judges within the U.S. legitimize human rights protection as fundamental. Human rights are not some set of abstract rights left to states to decide what rights shall be deemed human rights, or which human rights are worthy of protection within a particular jurisdiction.[255]

Finally, the U.S. played a key role in the development of human rights law and the creation of the UN. Thus, it is unconceivable that it ratifies human rights treaties with a non-self-executing declaration. Such a unilateral statement frustrates the objective and purpose of the treaty, which is contrary to international law. Also, a non-self-executing declaration as to human rights treaties, goes against the U.S.

> present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. ICCPR art. 2(2) Jun. 8, 1992, 99 U.N.T.S. 171. (emphasis added).

However, it specifies "where not already provided for by existing legislative or other measures…" The U.S. Constitution already provides that treaties are to be part of the Supreme Law of the Land, U.S. CONST. art. VI, § 2, and therefore it is binding upon the country.

[255] DAVIS, *supra* note 4, at 5 (citations omitted).

Constitution, U.S. history, roots and beliefs in the protection of *unalienable rights* to achieve freedom.

For all the reasons stated above, human rights treaties do not need legislative implementation to be judicially enforceable in U.S. and state courts. Hence, human rights treaties are self-executing in the U.S.[256]

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[256] This author recognizes that exists a debate as to whether the treaty-making power of the President with two thirds of the Senate's consent (without the House of Representative's consent) infringes the Tenth Amendment of the U.S. Constitution, because the ratified treaty can govern matters that are beyond the scope of the Federal Government's power and thus, override the powers of states (states of the U.S.). The Tenth Amendment of the U.S. Constitution states: "The powers not delegated to the United States by Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." U.S. CONST. amend. X. In Missouri v. Holland, 252 U.S. 416, 432 (1920), the U.S. Supreme Court expressed:

> [i]t is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.

However, in that case the U.S. Supreme Court expressed that although most of the federal laws are carried within the states and "many of them deal with matters which in the silence of such laws the states might regulate," *Id.* at 434, there was involved a matter of national interest. *Id.* at 435. Thus, such interest can only be protected with the action of the Federal Government. *Id.*

As it was discussed in this article, international human rights law involves supranational *unalienable rights.* As such, human rights are even above the U.S. Federal Government. Also, the provisions in the Bill of Rights of the U.S. Constitution that are considered fundamental rights have been extended to the states and territories by the Federal Government. Therefore, such fundamental constitutional rights may not be violated by neither the Federal Government, nor the states, nor the territories. Consequently, it can be concluded, that as the protection of the human rights are of *international* (beyond national) interest, there is no infringement upon the Tenth Amendment of the U.S. Constitution when the U.S. ratifies and binds itself to a human rights treaty. Such conclusion may be developed in a future academic article.