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Treaty Enforcement in Domestic Courts

A Comparative Analysis

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International law today is not confined to regulating the relations between the states. Its scope continues to extend. Today matters of social concern, such as health, education, and economics apart from human rights fall within the ambit of international regulations. International law is more than ever aimed at individuals.[1]

This book presents a comparative analysis of the role of domestic courts in treaty application. In evaluating the role of domestic courts, it is helpful to distinguish among three types of treaty provisions. Horizontal treaty provisions regulate relations between states; vertical provisions regulate relations between states and private parties; and transnational provisions regulate relations among private parties that cut across national boundaries. Domestic courts are rarely invited to apply horizontal treaty provisions. However, private parties frequently seek access to domestic courts to vindicate rights that arise from vertical and/or transnational treaty provisions.

The use of treaties to regulate vertical and transnational relationships is not a new phenomenon. Two centuries ago, Chief Justice Marshall, writing for the U.S. Supreme Court, declared: "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."[2] Although states have used treaties to regulate transnational and vertical relationships for centuries, there has been an exponential growth in treaty making in this area over the past few decades. The rapidly growing number of treaties that involve transnational and

[1] People's Union for Civil Liberties v. Union of India, 18 December 1996, [1999] 2 L.R.C. 1, at 12, per Kuldip Singh J.
[2] Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348 (1809).

vertical relationships is one reason it is important to understand the role of domestic courts in treaty enforcement.

Domestic adjudication is not the only mechanism for private parties to vindicate their treaty-based rights, but it is an important mechanism. On the international plane, there is frequently a gap between rights and remedies, because treaty provisions that are intended to protect the rights of private parties often do not grant the intended beneficiaries a right of access to international courts to adjudicate claims arising under those treaties. Insofar as treaties create private rights without granting private parties access to international tribunals, the effective enforcement of transnational and vertical treaty provisions may depend on the willingness of domestic courts to enforce treaty-based rights on behalf of private parties.

This book examines the application of treaties by domestic courts in eleven countries: Australia, Canada, Germany, India, Israel, the Netherlands, Poland, Russia, South Africa, the United Kingdom, and the United States. These eleven countries were not chosen at random: wealthy, democratic countries are overrepresented in the sample. It is difficult to draw reliable conclusions about more than 190 states in the world based on the eleven states analyzed in this volume. Even comparisons among the eleven countries are not wholly scientific. The book includes one chapter on each of the eleven countries; a different author has written each chapter. Comparisons across countries are invariably influenced, to some degree, by the individual authors' decisions about which points deserve emphasis. Despite these caveats, though, the analysis in the subsequent chapters does support several interesting conclusions.

The central question addressed in each of the eleven country chapters is this: do domestic courts provide remedies to private parties who are harmed by a violation of their treaty-based primary rights? I use the term *remedies* here, and throughout this introductory chapter, in a broad sense to include a judicial order designed to prevent an incipient treaty violation or to halt an ongoing violation, as well as orders designed to compensate victims for past harms. In brief, the most significant conclusions that emerge from this study are as follows:

- Domestic courts in eight of the eleven countries examined in this volume – Australia, Canada, Germany, India, the Netherlands, Poland, South Africa, and the United Kingdom – generally enforce treaty-based rights on behalf of private parties. However, the evidence is somewhat mixed for the other three countries: Israel, Russia, and the United States.

- In Israel and Russia, the trends are moving in the direction of greater judicial enforcement of treaties on behalf of private parties. The United States is the only country studied in this volume in which the trends are moving in the opposite direction.[3]
- The conventional wisdom is wrong, insofar as the conventional wisdom holds that direct judicial application of treaties is a more effective means of treaty enforcement than indirect application. In countries such as Canada and India, where domestic law precludes direct application of treaties, domestic courts play an active role in treaty enforcement by applying treaties indirectly. In contrast, in the United States, for example, although domestic courts have the authority to apply treaties directly in some cases, they rarely use their judicial power to remedy treaty violations committed by government actors.

Comparative analysis of the role of domestic courts in treaty enforcement is a topic that has received insufficient scholarly attention. Prior comparative studies of treaties within domestic legal systems have tended to focus primarily on the roles of the legislative and executive branches.[4] The most significant prior work that focused on the role of domestic courts is now more than twenty years old, and it dealt only with Western Europe and the United States.[5] In contrast, this book provides an updated analysis of the domestic judicial enforcement of treaties in countries from Africa, the Middle East, the Asia-Pacific region, Eastern and Western Europe, and North America.[6]

This book consists of fourteen chapters, including this introductory one. Chapters 3 through 13 provide detailed analyses of the judicial enforcement of treaties in the eleven countries identified previously. Chapter 2, written by Professor Sean Murphy, addresses the question whether international law obligates states to grant private parties access to national courts to vindicate

[3] Throughout the nineteenth century, U.S. courts routinely enforced treaties on behalf of private parties. *See* David Sloss, *When Do Treaties Create Individually Enforceable Rights?* 45 COLUM. J. TRANS'L L. 20 (2006). In recent years, though, U.S. courts have been far less hospitable to treaty claims. *See* chapter 13 in this volume.

[4] *See, e.g.*, NATIONAL TREATY LAW AND PRACTICE (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington, eds.) (2005); PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994).

[5] THE EFFECTS OF TREATIES IN DOMESTIC LAW (Francis G. Jacobs & Shelley Roberts eds., 1987).

[6] The project originally envisioned chapters on Argentina, Brazil, China, Mexico, Nigeria, and South Korea, in addition to the other countries noted herein. For various reasons, none of those chapters materialized.

treaty-based rights. Chapter 14, written by Professor Michael Van Alstine, provides an overall summary of the eleven country chapters.

In light of the contributions by Professors Murphy and Van Alstine, this introductory chapter is intended to accomplish three distinct tasks. Section I presents some general comments on the scope and relevance of the overall project. Section II provides a summary of the eleven country chapters, focusing on the question of whether domestic courts provide remedies to private parties harmed by a violation of their treaty-based rights. Section II differs from Professor Van Alstine's chapter in that he provides a broad-based overview of the materials presented in the eleven country chapters, whereas Section II draws selectively from the country chapters to provide a more narrowly focused analysis of a single question.

Section III presents an alternative perspective on some of the international law issues analyzed in Professor Murphy's chapter. In his contribution, Professor Murphy presents a very thorough and insightful analysis of the question of whether international law obligates "a state to open its courts for private persons to vindicate rights or benefits that a treaty accords to them."[7] He concludes that the answer is generally no, except insofar as a specific treaty creates an explicit or implicit obligation to do so. Section III frames the question in a slightly different way: it asks whether customary international law obligates states to provide remedies for private parties who are harmed by a violation of their treaty-based rights. By posing a different question, I reach a slightly different answer. Section III contends that international law sources provide some support for the proposition that customary international law obligates states to provide remedies for private parties who are harmed by a violation of their treaty-based rights. Ultimately, though, I agree with Professor Murphy that there is presently insufficient evidence of state practice or *opinio juris* to establish such a rule of customary international law. Professor Murphy contends, and I agree, that there may be an emerging rule of customary law along these lines.

I. PRELIMINARY ISSUES

The bulk of this introductory chapter is devoted to an analysis of judicial practice in the eleven states surveyed in this volume. Before turning to that subject, however, there are two points that merit brief preliminary comments.

[7] *See* Chapter 2, pg. 61.

A. *Domestic Courts as Transnational Actors*

There are at least three distinct reasons why it is important for domestic courts to provide remedies for individual victims of treaty violations. First, many modern treaties codify an agreed understanding about the content of universal moral norms. Human rights treaties and humanitarian law treaties, in particular, express the collective moral judgment of people from many different cultures about the standards of conduct that determine what are, and what are not, acceptable ways for governments to treat individual human beings. To the extent that domestic courts enforce the norms embodied in those treaties, governments are more likely to comply with those norms. Judicial enforcement by domestic courts is not the only factor that influences governmental compliance, but it is a significant factor. The better the record of governmental compliance, the closer we come to realizing in practice the humanitarian ideals that underlie contemporary human rights and humanitarian law.

Second, there are numerous treaties that do not reflect universal moral norms but that codify agreements designed to promote more efficient and effective transnational relations between and among private parties. For example, the New York Convention[8] facilitates arbitration of international business disputes by establishing rules that promote effective enforcement of arbitral awards in domestic courts. Similarly, the Warsaw Convention[9] facilitates international aviation by providing a set of agreed rules governing the liability of airlines for international transportation of cargo and passengers. The New York and Warsaw conventions are just two examples of broad-based, multilateral treaties that ultimately rely on domestic courts as a principal enforcement mechanism. These and other treaties help promote the growth of a global economy that provides economic benefits for billions of people. If domestic courts failed to enforce such treaties, the private actors whom the treaties are designed to benefit could be deprived of those benefits.

Third, as mentioned previously, the fact that many treaties create private rights without granting private parties access to international dispute resolution mechanisms creates a right-remedy gap on the international plane. Domestic courts are not the only actors capable of filling that gap, but they

[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, U.N. Registration No. I-4739 [hereinafter, New York Convention].

[9] Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature Oct. 12, 1929, Registration No. LoN-3145 [hereinafter, Warsaw Convention].

can play a vital role in bridging the gap. Conversely, insofar as domestic courts fail or refuse to apply treaty-based norms, there is a risk that those norms may be underenforced.

Of course, there are limits on the role of domestic courts in enforcing treaties. Domestic courts can help promote compliance with vertical and transnational treaty obligations, but they do not ordinarily become involved in regulating horizontal relations between states. In addition, there are some vertical and transnational treaties that create international dispute resolution mechanisms, thereby relegating domestic institutions to a secondary role.[10] For some treaties that lack international enforcement mechanisms, some states may prefer to rely on domestic administrative mechanisms rather than courts for the domestic application of vertical and/or transnational treaty provisions.[11] Despite these and other limitations,[12] though, the chapters in this volume show that domestic courts in many countries do play a significant role in treaty enforcement. This is a very positive development because vigorous application of treaty norms by domestic courts helps promote better compliance with those norms.

B. *Monism and Dualism*

The terms *monism* and *dualism* are often used to describe two different theoretical perspectives on the relationship between domestic and international law. Monists believe that domestic and international law are both parts of a single global legal system. Dualists believe that domestic law and international law are independent legal systems.[13] However, the terms *monism* and *dualism* are also used to describe different types of domestic legal systems.[14] When used in this way, the proposition that a particular state is dualist does not say anything about the general relationship between domestic and international law; it merely says something about the status of international law in the domestic legal system of that state.

Although scholars use the terms *monist* and *dualist* to describe different types of domestic legal systems, the actual legal systems of many states do

[10] For example, bilateral investment treaties typically rely on investor-state arbitration as the primary dispute resolution mechanism.

[11] For example, many states have created administrative mechanisms to implement their obligations under the UN Refugee Protocol. In such circumstances, courts typically provide a fallback mechanism to help ensure the integrity of the administrative process.

[12] *See infra* notes 320–25 and accompanying text.

[13] *See, e.g.*, Ian Brownlie, Principles of Public International Law 31–33 (7th ed. 2008).

[14] *See, e.g.*, Anthony Aust, Modern Treaty Law and Practice 181–95 (2d ed. 2007).

not fit neatly into either of these two categories.[15] Nevertheless, it is helpful to divide the eleven countries analyzed in this volume into two broad groups: traditional dualist states and hybrid monist states.[16] Australia, Canada, India, Israel, and the United Kingdom are traditional dualist states; treaties never have the force of law within their domestic legal systems. Germany, the Netherlands, Poland, Russia, South Africa, and the United States are hybrid monist states; in these states, at least some treaties do have the force of law within the domestic legal system.[17]

One might assume that domestic courts play a more active role in enforcing treaties in hybrid monist states than in traditional dualist states. However, the evidence in the ensuing chapters belies that assumption. In the five traditional dualist states examined in this volume, domestic courts play a fairly active role in treaty enforcement, but they apply treaties indirectly, not directly. There are many variations on the theme of indirect application. The most common approaches are for legislatures to enact legislation to incorporate a treaty into domestic law and for courts to apply a presumption that statutory and/or constitutional provisions should be interpreted to conform to international obligations codified in unincorporated treaties. In four of the five dualist states (Australia, Canada, India, and the United Kingdom), the judicial presumption of conformity, combined with the legislative practice of enacting statutes to implement treaties that require domestic implementation, means that private parties who are harmed by a violation of their treaty-based rights can usually obtain a domestic legal remedy, even though the courts do not apply treaties directly. State practice in Israel is similar, except for cases involving the Occupied Territories, where there is a history of judicial complicity in government violations of the Geneva Conventions.[18]

In the six hybrid monist states, domestic courts sometimes apply treaties directly as law because, in these states, at least some treaties have the status of law within their domestic legal systems. In four of these states – Germany, the Netherlands, Poland, and South Africa – the evidence suggests that domestic courts play a fairly active role in treaty enforcement. In these four

[15] *See id.*, at 181–82.

[16] I credit Professor Michael Van Alstine with coining the term *hybrid monist states*. *See* Chapter 14 in this volume. I prefer the term *hybrid monist state* because it is doubtful whether there are any actual states that adopt a pure monist system – that is, a system in which all international legal rules trump all domestic legal rules.

[17] Although it is true that at least some treaties have the force of law in hybrid monist states, such states adopt very different approaches to the hierarchical relationship between treaties and other laws. *See* Chapter 14, pgs. 578–81 (comparing hybrid monist states in this respect).

[18] *See* Chapter 7.

states, private parties who are harmed by a violation of their treaty-based rights can generally obtain a domestic legal remedy.[19]

In the United States and Russia the evidence is somewhat mixed. To appreciate this point, it is helpful to distinguish between transnational cases, where private parties seek to enforce treaties against other private parties, and vertical cases, where private parties seek a remedy for an alleged treaty violation by a government actor. The country chapters show that domestic courts in the United States and Russia routinely apply treaties to help resolve transnational disputes between private actors.[20] However, domestic courts in Russia rarely grant judicial remedies to private parties who are the victims of treaty violations committed by the host government.[21] U.S. courts occasionally grant remedies to private actors in these types of cases, but U.S. courts frequently avoid holding government actors accountable for treaty violations by adopting an interpretive methodology that favors the government's interpretation of a treaty or by applying judicial avoidance doctrines to refrain from deciding the merits of a treaty-based claim.[22]

In sum, there does not appear to be any significant correlation between the monist-dualist dichotomy and the actual practice of domestic courts, except for the purely formal matter that courts in hybrid monist states sometimes apply treaties directly, whereas courts in dualist states apply treaties only indirectly. In terms of practical results, though, "[t]he attitude of courts themselves may be as important as the formal features of the constitutional system."[23]

II. AN ANALYSIS OF STATE PRACTICE

This section analyzes judicial practice in the eleven states surveyed in this volume, focusing on the question of whether domestic courts provide remedies to private parties who are harmed by a violation of their treaty-based primary rights. The first subsection analyzes state practice in three continental European states: Germany, Poland, and the Netherlands. The second subsection addresses three Commonwealth states: Australia, Canada, and the United Kingdom. The third subsection discusses judicial practice in two other Commonwealth states: India and South Africa. India and South Africa are unique because their highest courts have an established record of

[19] *See infra* Sections II.A and II.C.
[20] *See* Chapters 10 and 13 in this volume on Russia and the United States, respectively.
[21] *See infra* Section II.E.
[22] *See* Chapter 13.
[23] Chapter 8, pg. 369.

judicial activism. Domestic courts in these eight states generally do provide remedies for treaty violations.

The fourth subsection addresses Israel and the United States, countries with independent judiciaries that have been hesitant to play an active role in overseeing executive compliance with national treaty obligations. The final subsection analyzes judicial practice in Russia, a state that does not have a strong, independent judiciary. In Israel, the United States, and Russia, domestic courts generally do enforce transnational treaty obligations. However, with respect to vertical treaty obligations, domestic courts in Russia and the United States do not consistently provide remedies for private parties who are harmed by a violation of their treaty-based primary rights. In Israel, the problem of judicial underenforcement relates primarily to the Occupied Territories.

A. *Germany, Poland, and The Netherlands*

In Germany, Poland, and the Netherlands, domestic courts play an active role in promoting compliance with treaty obligations. Courts in those countries generally do provide remedies for individuals who are harmed by a violation of their treaty-based primary rights. There are four key features of these legal systems that help explain this judicial practice. First, in all three states, many treaties are a part of the domestic legal order. Second, the domestic courts in these states recognize that many treaties have direct effect and that individuals have standing to invoke treaties before domestic courts. Third, the courts in all three states often apply treaties indirectly to harmonize domestic law with the state's international obligations. Finally, all three states are members of the European Union. This subsection briefly analyzes the significance of each of these factors.

1. Treaties within the Domestic Legal Order. Under the constitutional systems of Germany, Poland, and the Netherlands, at least some treaties have the status of law within the domestic legal system. In the Netherlands, "[a]ll treaties that are binding on the Netherlands as a matter of international law are automatically incorporated and thus have the force of law in the domestic legal order."[24] In Germany, "[u]nder the prevailing interpretation of Article 59 of the Grundgesetz, duly ratified treaties are part of German law."[25] In Poland, "[a] ratified treaty becomes, by virtue of its ratification,

[24] *Id.*, pg. 331.
[25] Chapter 5, pg. 209.

a 'part of the domestic legal order.'"[26] However, "agreements of a purely administrative nature" that are binding on Poland as a matter of international law but enter into force without ratification are not part of the domestic legal order.[27]

Although many treaties are part of the domestic legal orders in Germany, Poland, and the Netherlands, the three states differ in terms of the status they accord to treaties. In the Netherlands, treaties have a higher rank than statutes: in the event of a conflict between a statute and a treaty, the treaty takes precedence, even with respect to a later-in-time statute.[28] Indeed, "the supremacy of treaties over domestic law applies even to the Constitution itself, at least in those cases where a treaty has been adopted pursuant to article 91(3) of the Constitution, which requires a two-thirds majority vote in both Chambers of Parliament."[29]

In Poland, the rank of a treaty within the domestic legal order depends on the process that precedes ratification. Certain important categories of treaties cannot be ratified without prior statutory authorization.[30] "Treaties ratified upon statutory authorization enjoy a suprastatutory rank. . . . This constitutional arrangement places the rank of treaties on a higher level than the rank of authorizing statutes."[31] In contrast, treaties ratified without statutory authorization do not take precedence over statutes. "[S]ome authors accept that such treaties have a rank equal to ordinary statutes; others assign them a sub-statutory position."[32]

In Germany, also, the rank of a treaty within the domestic legal system depends on the domestic process used to authorize ratification. Article 59 of the German Constitution authorizes the president to conclude treaties. However, "ratification requires the prior consent of the Parliament if the treaty deals with the 'political relations' of the Federation, or if it relates to matters that would require legislation when regulated domestically."[33] "The domestic rank of treaties concluded with legislative consent is equal to that of domestic legislation."[34] In contrast, treaties ratified without legislative consent have a lower rank.

[26] Chapter 9, pg. 378 (quoting art. 91, sec. 1 of the Constitution).
[27] *Id.*, pg. 376.
[28] *See* Chapter 8, pg. 334 (citing art. 94 of the Dutch Constitution).
[29] *Id.*
[30] *See* Chapter 9, pgs. 376–77.
[31] *Id.*, pg. 379.
[32] *Id.*, pg. 380.
[33] Chapter 5, pg. 214.
[34] *Id.*, pg. 217.