

The Role of Domestic Courts in Treaty Enforcement

A COMPARATIVE STUDY

Edited by

DAVID SLOSS

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THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT

A Comparative Study

This book examines the application of treaties by domestic courts in eleven countries. The central question is whether domestic courts actually provide remedies to private parties who are harmed by a violation of their treaty-based rights. The analysis shows that domestic courts in eight of the eleven countries – Australia, Canada, Germany, India, the Netherlands, Poland, South Africa, and the United Kingdom – generally do enforce treaty-based rights on behalf of private parties. On the other hand, the evidence is 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 surveyed where the trend is moving in the opposite direction. U.S. courts' reluctance to enforce treaty-based rights undermines efforts to develop a more cooperative global order.

Professor David Sloss joined the faculty of Santa Clara University School of Law in 2008. He was a faculty member at Saint Louis University School of Law from 1999 to 2008. During his academic career, Professor Sloss has published approximately two dozen law review articles. Before embarking on an academic career, Professor Sloss spent nine years as a civil servant in the U.S. government. During that time, he participated in drafting and negotiating several important treaties and other international agreements. Professor Sloss earned his J.D. from Stanford Law School, his M.P.P. from Harvard University, and his B.A. from Hampshire College.

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Preface

As I prepare to send this book to the printer, President Obama is evaluating potential nominees to fill Justice Souter's soon-to-be-vacant slot on the United States Supreme Court. The selection of the next Supreme Court Justice could have significant implications for the international legal system and for the United States' participation in that system.

The last two individuals appointed to the Supreme Court – Chief Justice Roberts and Justice Alito – view international law with a mixture of contempt and indifference, as evidenced by the Chief Justice's 2008 opinion in *Medellin v. Texas* (which Justice Alito joined). They apparently view their job, in part, as one of shielding the domestic legal system from the unwanted intrusion of international law. Their elevation to the nation's highest court exemplifies a broader trend in which the judicial branch in the United States has become a key obstacle to the nation's performance of its international treaty obligations.

This book demonstrates that U.S. judges are out-of-step with their counterparts in other modern democratic nations. In most of the nations surveyed in this volume, domestic courts play a constructive role in promoting compliance with national treaty obligations by providing remedies to private parties who are harmed by a violation of their treaty-based rights. For most of United States history, judges in this nation played a similar role: they routinely enforced treaties on behalf of private parties, as envisioned by the Constitution's founders. Unfortunately, over the past several decades, U.S. presidents have filled the courts with judges who have abandoned the judiciary's traditional mission of enforcing individual rights protected under international law.

President Obama has an historic opportunity to reverse this unfortunate trend by appointing judges who, like their counterparts in other free

countries, will use their judicial power to promote compliance with international treaty obligations, rather than obstructing performance of those obligations. One Supreme Court Justice cannot transform the legal system overnight. But she can help nudge the courts toward an international-law-friendly perspective on the U.S. constitutional system. If this book makes a small contribution to that goal, the editor will be very gratified.

David Sloss

Santa Clara, California

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As a professor, I am always thankful for the generosity of the Deans who support my scholarship. I began this project as a professor at Saint Louis University (SLU). I am grateful to Jeff Lewis, the Dean at SLU, for his consistent generosity in funding my research. I completed this project as a professor at Santa Clara University. Don Polden, the Dean at Santa Clara, has been equally generous in funding my work during the final stages of this project. I am very grateful for his support.

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I presented an early draft of the chapter on the United States in December 2007 at a meeting of the American Society of International Law interest group on international law in domestic courts. Several people at that meeting provided valuable feedback, including Curt Bradley, Jacob Cogan, Duncan Hollis, John McGinnis, Peggy McGuinness, Paul Stephan, David Stewart, Ed Swaine, Melissa Waters, Mark Weisburd, and Ingrid Wuerth. I made fairly drastic revisions in response to their insightful criticisms. I believe that the final chapter is much better, thanks to their comments. I also received valuable feedback on subsequent drafts of the chapter from Katherine Barnes, Robert Chesney, Marina Hsieh, Bradley Joondeph, and Chris Whytock. I thank all of them for their comments, suggestions, and insights. Of course, I alone am responsible for any deficiencies in the final chapter.

I presented a draft of Chapter 1 in December 2008 at a meeting of the Northern California International Law Scholars group. At that meeting, I received valuable comments from Diane Amann, John Barton, David Caron, Anupam Chander, Bill Dodge, Oona Hathaway, and Beth Van Schaack. Others who provided very helpful feedback on Chapter 1 include Anthony Aust, John Dugard, Duncan Hollis, Sean Murphy, John Parry, Andreas Paulus, and Gib van Ert. I am certain that the final product is much better as a result of their comments and suggestions. As above, I am solely responsible for any remaining errors, mistakes, or omissions.

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Contents

<i>Contributors</i>	<i>page</i> xix
<i>Preface</i>	xxv
<i>Acknowledgments</i>	xxvii
1 Treaty Enforcement in Domestic Courts: A Comparative Analysis <i>David Sloss</i>	1
2 Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons? <i>Sean D. Murphy</i>	61
3 Australia <i>Donald R. Rothwell</i>	120
4 Canada <i>Gib van Ert</i>	166
5 Germany <i>Andreas L. Paulus</i>	209
6 India <i>Nihal Jayawickrama</i>	243
7 Israel <i>David Kretzmer</i>	273

8	The Netherlands <i>André Nollkaemper</i>	326
9	Poland <i>Lech Garlicki, Małgorzata Masternak-Kubiak, and Krzysztof Wójtowicz</i>	370
10	Russian Federation <i>William E. Butler</i>	410
11	South Africa <i>John Dugard</i>	448
12	United Kingdom <i>Anthony Aust</i>	476
13	United States <i>David Sloss</i>	504
14	The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions <i>Michael P. Van Alstine</i>	555
	<i>Index</i>	615

Detailed Contents

<i>Contributors</i>	xix
<i>Preface</i>	xxv
<i>Acknowledgments</i>	xxvii
1 Treaty Enforcement in Domestic Courts:	
A Comparative Analysis	1
I. Preliminary Issues	4
A. Domestic Courts as Transnational Actors	5
B. Monism and Dualism	6
II. An Analysis of State Practice	8
A. Germany, Poland, and The Netherlands	9
1. Treaties within the Domestic Legal Order	9
2. The Direct Effect of Treaties and the Rights of Private Parties	11
3. Friendly Interpretation and Indirect Application	13
4. The Influence of European Law	14
B. Australia, Canada, and the United Kingdom	17
1. Legislative Incorporation	17
2. Full Incorporation of Treaties	18
3. Unincorporated Treaties	20
4. Partial Incorporation	22
5. Treaties and Constitutional Interpretation	23
C. India and South Africa	25
1. Constitutional Background	25
2. International Law in Constitutional Interpretation	27
3. Remedies and Procedure	29
4. Statutory Interpretation and Other Matters	30

D. Israel and the United States	32
1. The Status of Treaties in Domestic Law	32
2. Harmonizing Domestic Law with Treaty Obligations	34
3. Limiting the Domestic Effects of Treaties	37
E. Russia	39
1. The Domestic Legal Status of Treaties	39
2. Judicial Application of Treaties	40
3. Treaty-Based Constraints on Government Action	41
III. The Customary International Law of Remedies	43
A. Views of International Judges and Experts	44
1. Primary and Secondary Rules	45
2. The Customary International Law of Remedies	48
3. The Duty to Make Reparations to Private Parties	50
4. The Duty to Grant Private Parties Access to Domestic Tribunals	52
B. State Practice and <i>Opinio Juris</i>	56
C. Is There an Emerging Rule?	58
2. Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?	61
I. Introduction	61
II. Invocation of Treaty Norms by Individuals in National Courts Under General International Law	66
A. Vienna Convention on the Law of Treaties	66
B. Customary International Law	71
1. <i>Par in Parem Non Habet Jurisdictionem</i>	72
2. Obligations of Result and Obligations of Conduct	74
C. General Principles of International Law	79
D. Views of Publicists	85
III. Invocation of a Treaty Norm by Individuals in National Courts Pursuant to an Express Treaty Obligation	85
IV. Invocation of a Treaty Norm by Individuals in National Courts Pursuant to an Implied Treaty Obligation	96
V. When Should a Right to Invoke the Treaty in National Courts Not Be Implied in the Treaty?	105