2- TREATIES AND OTHER INTERNATIONAL AGREEMENTS

(ii) Self-Executing and Non-Self-Executing Treaties

(footnotes deleted)

Supreme Court of the United States.

ASAKURA
v.
CITY OF SEATTLE et al.

No. 211.

Argued and Submitted Feb. 25, 1924.
Decided May 26, 1924.

Mr. Justice BUTLER delivered the opinion of the Court.

[1] Plaintiff in error is a subject of the emperor of Japan, and since 1904 has resided in Seattle, Wash. Since July, 1915, he has been engaged in business there as a pawnbroker. The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker, and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in the business unless he shall have a license, and the ordinance provides***340** 'that no such license shall be granted unless the applicant be a citizen of the United States.' Violations of the ordinance are punishable by fine or imprisonment or both. Plaintiff in error brought this suit in the superior court of King county, Wash., against the city, its comptroller, and chief of police, to restrain them from enforcing the ordinance against him. He attacked the ordinance on the ground that it violates the treaty between the United States and the empire of Japan, proclaimed April 5, 1911 (37 Stat. 1504) . . . It was shown that he had about $5,000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. The superior court granted the relief prayed. On appeal, the Supreme Court of the state held the ordinance valid and reversed the decree....

Does the ordinance violate the treaty? Plaintiff in error invokes and relies upon the following provisions:

> 'The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and

retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. * * * The citizens or subjects of each * * * shall receive, in the territories of the other, the most constant protection and security of their persons and property. * * *' Article 1.

***341** A treaty made under the authority of the United States---
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'shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.' Constitution, art. 6, § 2.

[2][3] The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations.

...The treaty was made to strengthen friendly ralations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. The treaty is binding within the state of Washington.. . .The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker. But it ***342** makes it impossible for aliens to carry on the business. It need not be considered whether the state, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise. The grievance here alleged is that plaintiff in error, in violation of the treaty, is denied equal opportunity.

Decree reversed.

All footnotes except 8 & 9 are omitted.

United States Court of Appeals, Ninth Circuit.

The PEOPLE OF SAIPAN, By and Through Herman Q. GUERRERO, et al., Plaintiffs and Appellants,
v.
UNITED STATES DEPARTMENT OF INTERIOR et al., Governmental Defendants and Appellees, and Continental Airlines, Inc., a Nevada corporation, Corporate Defendant and Appellee.

No. 73-1769.

July 16, 1974.

ALFRED T. GOODWIN, Circuit Judge:

Plaintiffs, citizens of the Trust Territory of the Pacific Islands (known also as Micronesia), sued in the district court to challenge the execution by the High Commissioner of the Trust Territory of a lease permitting Continental Airlines to construct and operate a hotel on public land adjacent to Micro Beach, Saipan. Plaintiffs appeal a judgment of dismissal.

The district court held that . . the Trusteeship Agreement [an agreement approved by joint resolution of Congress that, as explained below, has the same legal effect as Article II Treaty] does not vest plaintiffs with individual legal rights which they can assert in a federal court. . . .

. . Continental applied in 1970 to the Trust Territory government for permission to build a hotel on public land adjacent to Micro Beach, Saipan, an important historical, cultural, and recreational site for the people of the islands. Pursuant to ***94** the requirements of the Trust Territory Code, 67 T.T.C. § 53, Continental's application was submitted to the Mariana Islands District Land Advisory Board for its consideration. In spite of the Board's unanimous recommendation that the area be reserved for public park purposes, the District Administrator of the Marianas District recommended approval of a lease. The High Commissioner himself executed the lease on behalf of the Trust Territory government. An officer appointed by the President of the United States with the advice and consent of the Senate (48 U.S.C. § 1681a), the High Commissioner is the highest official in the executive branch of the Trust Territory

government.

Following its execution in 1972, the lease was opposed by virtually every official body elected by the people of Saipan. Indeed, the record in this case shows that the High Commissioner's decision was officially supported only by the United States Department of the Interior, the Trust Territory Attorney General (a United States citizen), and the District Administrator of the Marianas District (appointed by the High Commissioner, serving directly under him, and subject to removal by him).

II. TRUSTEESHIP AGREEMENT

Plaintiffs also asserted below and assert here that the action of the governmental defendants in leasing public land to an American corporation against the expressed opposition of the elected representatives of the people of Saipan and without compliance with NEPA is a violation of their duties under the Trusteeship Agreement. The district court rejected this argument, holding that the Trusteeship Agreement did not vest the citizens of the Trust Territory with rights which they can assert in a district court.

We cannot accept the full implications of this holding. . . insofar as it can be read to say that the Trusteeship Agreement does not create for the islanders substantive rights that are judicially enforceable.

The district court relied for its conclusion on language in Pauling v. McElroy, 164 F.Supp. 390, 393 (D.D.C.1958), aff'd on other grounds, 107 U.S.App.D.C. 372, 278 F.2d 252, cert denied, 364 U.S. 835, 81 S.Ct. 61, 5 L.Ed.2d 60 (1960). Pauling concerned an attempt to enjoin United States officials from proceeding with nuclear tests in the Marshall Islands, an area within the trusteeship. The controversy there, unlike the one here, involved the Trusteeship Agreement's grant of broad discretion to use the area for military purposes. See Trusteeship Agreement arts. 1, 5, 13, 61 Stat. 3301, 3302, 3304. We do not find Pauling to support the defendants' contention here that the plaintiffs cannot invoke the provisions of the Trusteeship Agreement to challenge the High Commissioner's power to lease local public land for commercial exploitation by private developers.

The right of Rhodesian and American citizens to maintain an action in the courts of the United States seeking enforcement of the United Nations embargo against Rhodesia was recently recognized in Diggs v. Shultz, 152 U.S.App.D.C. 313, 470 F.2d 461 (1972), cert. denied, 411 U.S. 931, 93 S.Ct. 1897, 36 L.Ed.2d 390

(1973). On the merits, the court denied specific relief because of Congressional action which was held to have abrogated the United Nations Security Council Resolution, but the right to seek enforcement in federal court was firmly established. That decision, if correct, suggests that the islanders here can enforce their treaty rights, if need be in federal court.

Article 73 of the United Nations Charter, 59 Stat. 1031, 1048, T.S. No. 993 (1945), which discusses non-self-governing territories generally, provides:

'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of ***97** the inhabitants of these territories are paramount, and accept as sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well- being of the inhabitants of these territories, and, to this end:

'a. To ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protections against abuses * * *.'

See also United Nations Charter art. 76, describing the basic objectives of the trusteeship system. Although the plaintiffs have argued that these articles of the United Nations Charter, standing alone, create affirmative and judicially enforceable obligations, we assume without deciding that they do not.

However, pursuant to Article 79 of the Charter, [FN8] the general principles governing the administration of trust territories were covered in more detail in a specific trusteeship agreement for the Trust Territory of the Pacific Islands. See generally L. Goodrich, E. Hambro & A. Simons, Charter of the United Nations: Commentary & Documents 502 (3rd ed. 1969). Specifically, Article 6 of the Trusteeship Agreement requires the United States to 'promote the economic advancement and self-sufficiency of the inhabitants, and to this end * * * regulate the use of natural resources' and to 'protect the inhabitants against the loss of their lands and resources * * *.'

FN8. 'The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in

> Articles 83 and 85.' United Nations Charter art. 79, 59 Stat. 1031, 1049.

Defendants contend, though, that provisions of the Trusteeship Agreement, including Article 6, can be enforced only before the Security Council of the United Nations. [FN9] We disagree, concluding that the Trusteeship Agreement can be a source of rights enforceable by an individual litigant in a domestic court of law.

> FN9. Unlike the other ten trusteeships set up after World War II, pursuant to agreements between the United Nations and various nations, the Trust Territory was designated as a 'strategic' trust. Trusteeship Agreement art. 1, 61 Stat. 3301. See 1 M. Whiteman, Digest of International Law 766. This designation results in the United States being responsible to the Security Council for the administration of the Trust Territory--where the United States possesses veto power (United Nations Charter art. 27, 59 Stat. 1041)--rather than to the General Assembly. United Nations Charter art. 83(1), 59 Stat. 1050.

The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution. . .

The preponderance of features in this Trusteeship Agreement suggests the intention to establish direct, affirmative, and judicially enforceable rights. The issue involves the local economy and environment, not security; the concern with natural resources and the concern with political development are explicit in the agreement and are general international concerns as well; the enforcement of these rights requires little legal or administrative innovation in the domestic fora; and the alternative forum, the ***98** Security Council, would present to the plaintiffs obstacles so great as to make their rights virtually unenforceable. . . .

[13] We recognize that the Trusteeship Agreement purports to obligate the United States, not the individual who happens to be High Commissioner. Nonetheless, because of the process of his appointment, the High Commissioner has the responsibility to act in a manner consistent with the duties assumed by the United

States itself in the Trusteeship Agreement.

[Concurring opinion of Chief Justice Trask omitted.]

[Footnotes Omitted]

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Robert Morris POSTAL, Salem L. Forsythe, and George A. Chitty,
Defendants-
Appellants.

No. 77-5354.

Feb. 15, 1979.

TJOFLAT, Circuit Judge:

This case presents a consequential issue of international and domestic law that has been noted in this circuit but not yet authoritatively decided: whether a court of the United States can assert jurisdiction over persons arrested aboard a foreign vessel seized beyond the twelve-mile limit in violation of a particular provision of a treaty to which the United States and the foreign country are parties. We hold that such a violation does not divest the court of jurisdiction over the defendants.

The defendants in this case were convicted in a joint bench trial of conspiring to import marijuana into the United States, in violation of 21 U.S.C. s 963 (1976), and of conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C. s 846 (1976). In addition to questioning the jurisdiction of the district court over their persons, the defendants, all of whom appeal, make numerous arguments for reversal, which we shall address in due course. We find none of them persuasive. Therefore, we affirm as to all defendants....[Defendants were U.S. nationals , arrested on board a vessel registered in the Grand Caymen Islands, 16 miles from the shoreand hence outside the limits of the U.S. territorial sea.]

II. ANALYSIS

We noted at the outset of this opinion that the substantial issue in this case concerns the effect of a treaty violation on

the jurisdiction of the court over the defendants. This question involves the complex relationship between domestic and international law. Before we address this important issue, we examine the applicable treaty provisions to establish that they were indeed breached.

A. The Treaties

The treaties of concern are the Convention on the High Seas, Opened for signature April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962), and the Convention on the Territorial Sea and the Contiguous Zone, Opened for signature April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force Sept. 10, 1964). These treaties set forth principles of international law governing the relations of the ratifying states [FN8] with respect to territorial seas, those waters adjacent to a state's coast and subject to its sovereignty, and to the high seas, those waters lying seaward of the territorial seas and subject to the sovereignty of no state.

***869** The territorial sea, although defined in the Convention on the Territorial Sea and the Contiguous Zone, is not delimited by these conventions. The limits asserted by coastal states are therefore to be judged under customary international law. Jessup, The United Nations Conference on the Law of the Sea, 59 Colum.L.Rev. 234, 246 (1959); See Anglo Norwegian Fisheries Case, (1951) I.C.J. 116, 132. The United States has long adhered to the widely accepted international rule that the territorial sea extends to three miles from the coast. E. g., United States v. California, 332 U.S. 19, 33-34, 67 S.Ct. 1658, 1666, 91 L.Ed. 1889 (1947); Cunard Steamship Co. v. Mellon, 262 U.S. 100, 122-23, 43 S.Ct. 504, 507, 67 L.Ed. 894 (1923); P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 49-60 (1927). The sovereignty of the coastal state extends into the territorial sea, Convention on the Territorial Sea and the Contiguous Zone art. 1, with the proviso that foreign vessels enjoy the right of innocent passage through it. Id. art. 14-23.

Beyond the territorial sea lie the high seas. See Convention on the High Seas art. 1. These waters are freely accessible to all nations and are not subject to the sovereignty of any nation. Id. art. 2. The regulation of a vessel on the high seas is normally the responsibility of the nation whose flag that vessel flies, and of that nation alone. Id. arts. 5, 6. Article 6 provides, in pertinent part, "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas."...

We find that article 6 of the Convention on the High Seas

was violated. This conclusion, however, does not end our inquiry, the issue remains as to the effect of the violation upon the defendants' convictions. To this important issue we now turn.

B. The Effect of the Treaty Violation

The defendants contend that because the second boarding was in violation of a treaty obligation of the United States, the district court did not have jurisdiction over them. We would summarily dismiss the defendants' contention, under the authority of ample precedent, if it concerned a mere violation of law not embodied in a treaty binding on the United States. A defendant may not ordinarily assert the illegality of his obtention to defeat the court's jurisdiction over him. Gerstein v. Pugh, 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54 (1975); Frisbie v. Collins, 342 U.S. 519, 522, 72 S.Ct. 509, 511-12, 96 L.Ed. 541 (1952); Ker v. Illinois, 119 U.S. 436, 444, 7 S.Ct. 225, 229, 30 L.Ed. 421 (1886); United States v. Quesada, 512 F.2d 1043, 1045 (5th Cir.), Cert. denied, 423 U.S. 946, 96 S.Ct. 356, 46 L.Ed.2d 277 (1975); United States v. Winter, 509 F.2d 975, 985-86 (5th Cir.), Cert. denied sub nom. Parks v. United States, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975); Voigt v. Toombs, 67 F.2d 744 (5th Cir. 1933), Cert. dismissed, 291 U.S. 686, 54 S.Ct. 442, 78 L.Ed. 1072 (1934). This proposition, the so-called Ker-Frisbie doctrine, is equally valid where the illegality results from a breach of international law not codified in a treaty. United States v. Cadena, 585 F.2d 1252, 1259-60 (5th Cir. 1978); United States v. Winter, 509 F.2d at 988-89; Autry v. Wiley, 440 F.2d 799, 802 (1st Cir. 1971); See United States v. Quesada ; United States v. Lopez, 542 F.2d 283 (5th Cir. 1976) (per curiam).

These precedents rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.
Frisbie v. Collins, 342 U.S. at 522, 72 S.Ct. at 512.[FN17]

Where a treaty has been violated, the rules may be quite different, as was demonstrated by the Supreme Court in the case of Cook v. United States, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933). Cook involved a libel brought against the British vessel Mazel Tov, which had been seized for smuggling liquor into the United States. The Court held that the seizure had been effected in violation of a treaty between the United States and Great Britain. The Court recognized the forfeiture principle

paralleling the Ker- Frisbie doctrine that the wrongful acquisition of property against which a libel has been filed does not affect the court's jurisdiction over the property. 288 U.S. at 121, 53 S.Ct. at 312. It went on, however, to hold this principle inapplicable because the United States "had imposed a territorial limitation upon its own authority" by entering into the treaty. Id. "Our government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws." Id....

Cook... must be viewed in the fuller context of treaty law to appreciate their reasoning, for it is not true that every treaty to which the United States is a party acts to limit the jurisdiction of its courts. Article 6 of the United States Constitution declares treaties made "under the Authority of the United States (to) be the supreme Law of the Land," but it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing. Whitney v. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386 (1888); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 311, 7 L.Ed. 415 (1829); Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952); Dickinson, Are the Liquor Treaties Self-Executing?, 20 Am.J.Int'l L. 444 (1926). In Whitney v. Robertson, the Court explained:

> A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect . . . . If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.
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> 124 U.S. at 194, 8 S.Ct. at 458.

Most significantly, the court in Cook declared the treaty in issue there to be self-executing. "(I)n a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions." 288 U.S. at 119, 53 S.Ct. at 311 (footnote omitted). The Court went on to hold that the treaty, being self-executing and therefore equivalent to federal legislation, superseded a customs statute that would otherwise have validated the seizure. Id.; see note 18 Supra.

We read Cook...to stand for the proposition that self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction over property and individuals

that would otherwise be subject to that jurisdiction. The ***876** law of treaties teaches, however, that treaties may have this effect only when self-executing. Therefore, the determinative issue in the case before us is whether article 6 of the Convention on the High Seas is self-executing. See Ficken, The 1935 Anti- Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law, 29 U.Miami L.Rev. 700, 724-27 (1975). We hold that it is not.

The question whether a treaty isself-executing is a matter of interpretation for the courts when the issue presents itself in litigation, Restatement (Second) of Foreign Relations Law of the United States s 154(1) (1965), and, as in the case of all matters of interpretation, the courts attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose. Board of County Commissioners v. Aerolineas Peruanasa, 307 F.2d 802, 806 (5th Cir. 1962), Cert. denied, 371 U.S. 961, 83 S.Ct. 543, 9 L.Ed.2d 510 (1963); A. McNair, Law of Treaties 365 (1961); 1 D. O'Connell, International Law 271 (1965). The parties' intent may be apparent from the language of the treaty, or, if the language is ambiguous, it may be divined from the circumstances surrounding the treaty's promulgation. Cook, 288 U.S. at 112, 53 S.Ct. at 308; Diggs v. Richardson, 180 U.S.App.D.C. 376, 555 F.2d 848, 851 (D.C.Cir. 1976); Johansson v. United States, 336 F.2d 809, 813 (5th Cir. 1964).

The self-execution question is perhaps one of the most confounding in treaty law.[FN21] "Theoretically a self-executing and an executory provision should be readily distinguishable. In practice it is difficult." Reiff, The Enforcement of Multipartite Administrative Treaties in the United States, 34 Am.J.Int'l L. 661, 669 (1940). A treaty may expressly provide for legislative execution. An example is found in articles 27 through 29 of the Convention on the High Seas, each of which begins with the preamble "Every State shall take the necessary legislative measures to . . . ." [FN22] Such ***877** provisions are uniformly declared executory. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 311-12, 7 L.Ed. 415 (1829); Dickinson, Supra, at 448. And it appears that treaties cannot affect certain subject matters without implementing legislation. "A treaty cannot be self-executing . . . to the extent that it involves governmental action that under the Constitution can be taken only by the Congress." Restatement (Second) of Foreign Relations Law of the United States s 141(3) (1965). Thus, since article 1, section 9 of the Constitution prohibits the drawing of money from the treasury without congressional enactment, it is doubtful that a treaty could appropriate moneys. The Over the Top, 5 F.2d 838, 845 (D.Conn.1925) (dictum); S. Crandall, Treaties s 74 (2d ed. 1916). The same appears to be the case with respect to criminal

sanctions. The Over the Top, 5 F.2d at 845; Dickinson, Supra, at 449-50.

Apart from those few instances in which the language of the provision expressly calls for legislative implementation or the subject matter is within the exclusive jurisdiction of Congress, the question is purely a matter of interpretation. Id. at 449. In carrying out our interpretive task, "we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943) (citations omitted). In the specific context of determining whether a treaty provision is self-executing, we may refer to several factors:

> the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range consequences of self- or non-self-execution.

People of Saipan v. United States Department of Interior, 502 F.2d 90, 97 (9th Cir. 1974), Cert. denied, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975). With these principles in mind, we proceed to examine the treaty provision in issue here, article 6 of the Convention on the High Seas.

Article 6 declares the exclusivity of a nation's jurisdiction over the vessels entitled to fly its flag: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." On its face, this language would bear a self-executing construction because it purports to preclude the exercise of jurisdiction by foreign states in the absence of an exception embodied in treaty. We are admonished, however, to ***878** interpret treaties in the context of their promulgation, and we think the context of article 6 compels the conclusion that it is not self-executing.

[7] We start with the observation that the Convention on the High Seas, as its preamble states, is intended to be "generally declaratory of established principles of international law." Indeed, that a state enjoys exclusive jurisdiction over its flag vessels, in the absence of an exception sanctioned under customary international law, is just such a principle. See The S.S. Lotus, (1927) P.C.I.J., ser. A, No. 10, at 25; Le Louis, 165 Eng.Rep. 1464, 1475 (Adm.1817); 1 L. Oppenheim, International Law 589 (8th ed. Lauterpacht 1955). But the question we must answer is whether by ratifying the Convention on the High Seas the

United States undertook to incorporate the restrictive language of article 6, which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and make it available in a criminal action as a defense to the jurisdiction of its courts. There is nothing in the circumstances surrounding the formulation and adoption of the Convention that would support the conclusion that it did.

The Convention on the High Seas is a multilateral treaty which has been ratified by over fifty nations, some of which do not recognize treaties as self-executing. It is difficult therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations. This is not to say that by entering into such a multilateral treaty the United States cannot without legislation execute provisions of it, but one would expect that in these circumstances the United States would make that intention clear. The lack of mutuality between the United States and countries that do not recognize treaties as self-executing would seem to call for as much. Here there was no such manifestation....

Since its inception, the United States has asserted limited jurisdiction over vessels on the high seas, generally but not always within the twelve-mile limit, to enforce a variety of interests not expressly authorized in treaties. As early as 1790, the United States professed authority to board vessels beyond the three-mile territorial sea. In An Act to Provide More Effectually for the Collection of Duties, ch. 35, 1 Stat. 145 (1790), the United States first specified a twelve-mile limit in which foreign vessels bound for the United States could be boarded to examine their manifests and inspect their cargoes. The Act also prohibited the unloading of foreign goods within twelve miles. Severe sanctions, including fines and forfeitures, were imposed for violation of its provisions.

The Supreme Court, in the seminal case of Church v. Hubbart, 6 U.S. (2 Cranch) 187, 2 L.Ed. 249 (1804), approved this legislation as within the sphere of a nation's competence to protect against the violation of its laws beyond the territorial sea....

***880** The 1790 Act is the progenitor of successive enactments authorizing the boarding and searching of foreign vessels within twelve miles of the coast of the United States and imposing penalties for violations of customs provisions operating within that limit. Through the years the courts have had numerous occasions to address the issue of the propriety of the exercise

of United States jurisdiction over foreign vessels within twelve miles but beyond three miles under these statutes and in the absence of treaty....

It is clear, therefore, that the consistent attitude of the United States has been that it may assert limited jurisdiction over foreign vessels within twelve miles of its coast. Although the conventions we construe today do provide for some control within this zone, the ambit of this control is much narrower than that which the United States has customarily asserted. See United States v. F/V Taiyo Maru, 395 F.Supp. 413 (D.Me.1975); M. McDougal & W. Burke, Supra, at 612-31, 875. A self-executing interpretation, which would eviscerate many of these provisions, would, therefore, be wholly inconsonant with the historical policy of the United States....

That we do not believe that it was the intent of the United States to so limit the operation of its statutes is borne out by the legislative history of the conventions. In testimony before the Senate Foreign Relations Committee, Mr. Arthur Dean, the Chairman of the United States Delegation to the 1958 Law of the Sea Conference, made the following remarks in response to questioning:

> (SENATOR LONG) Mr. Dean, would you point out and explain any article of these conventions which has the effect of superseding domestic legislation in the United States, either Federal or State legislation, and would you also point out any articles which would require new Federal legislation?
>
> MR. DEAN. Well, so far as I am aware, there is not anything in any of these conventions that we are presenting to the Senate which, so far as I am specifically aware, there is not anything that would supersede domestic legislation. I know you are familiar with the case of Missouri v. Holland (252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920)) that insofar as the United States has entered into a treaty that then becomes the law of the land. In all my work on these matters and study on these matters, while there may be some domestic legislation that might be affected I am not familiar with it, if there is.
>
> I think that as I said earlier, that all of these conventions would affect the relations of the United States in relation to the powers of other sovereign powers, and would not affect the relationship as between the United States and the several States.

Conventions on the Law of the Sea: Hearings on Executives J, K, L, M, N Before the Comm. on Foreign Relations, 86th Cong., 2d Sess. 75 (1960). Although Mr. Dean's statements are not wholly unequivocal, they do clearly indicate that it was not the intent of our delegation to affect the domestic legislation of the United States, either state or federal. Moreover, when the State Department ***882** was posed the same question by the Senate

Committee, it responded, "It does not appear that any of the convention provisions conflict with existing legislation. It does appear that some supplementary and new implementing legislation may be necessary or desirable." Id. at 92. We think these statements weigh against a self-executing interpretation of article 6.

CONSTITUTIONAL IMPLICATIONS OF GERMAN PARTICIPATION IN TREATY REGIMES

Georg Nolte

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2. Comparing U.S. and German Constitutional Law

Can a comparison between U.S. and German constitutional law at all make sense? At first impression, this may appear doubtful. After all, the framers of the U.S. constitution did not particularly want to encourage foreign entanglements while the mothers and fathers of the German constitution, in the aftermath of the Nazi regime, aspired to and encouraged international integration. The United States is much more powerful than Germany. The United States has a Presidential system, Germany has a Parliamentary one. These and other political and constitutional differences suggest that a narrow legal comparison of the constitutional rules on the delegation of sovereignty may be out of place. On the other hand, both the United States and Germany have substantially changed their relations with the rest of the world since the inception of their constitutions. The United States has become very much entangled in foreign alliances while the German post-war internationalist enthusiasm has given way to a much less self-denying attitude. The difference in terms of absolute power is in many areas less important than the difference in relative power. Finally, the difference between a Presidential and a Parliamentary system is not the most important when it comes to the undertaking and respecting of international legal obligations. The status of international law in domestic law and the powers of the courts to enforce international law are, I submit, to a large extent independent of the structural difference between a Presidential and a Parliamentary system. What is perhaps most important is that both the United States and Germany have a strong tradition of constitutional adjudication.

4. Federalism

Federalism is another area in which similar problems arise in the United States and in Germany. Both states are federal states. As in the United States and many other countries, Germany has lately seen a revival of state powers. The most important instance of this development is the inclusion in 1992 of a new Article 23 into the German Constitution which requires that any further delegation of sovereign powers to the European Union be approved not only by the Federal Parliament but also by the Second Chamber, the Federal Council (Bundesrat). The Federal Council is the representation of the state governments on the federal level. Approvals for delegations of sovereignty can probably be more easily obtained from the German Federal Council than from the U.S. Senate. Still, since the majority in the Federal

Council is often composed of state governments whose party is in the opposition at the federal level, this requirement can be a powerful tool in the hands of the opposition.

What is perhaps more important for day-to-day practice is the development of cooperative federalism in German foreign affairs. In 1995, the Constitutional Court declared that the Federal Government has a constitutional duty to consult with the states and take their views into account when it deals with state matters in European fora. This unwritten duty of "Federal loyalty" is spelled out more precisely by a constitutional amendment and legislation that require the Federal Government to consult with the Federal Council before it pronounces its position in European fora. These provisions require that the Federal Government adopt and pursue the position of the Federal Council in matters that are exclusive state matters. In the 1950s, the Federal Government and the States concluded an informal agreement according to which the Federal Government will only conclude treaties in (non-European international) matters that, domestically, are exclusive state matters if the agreement of all the states concerned has been secured. This agreement has so far prevented a court decision on the question whether a federal treaty power exists concurrently to the states' powers to conclude treaties in the areas of their respective competences. It is clear, however, that even if the Federal level had a concurrent treaty power in the states' area of competences it would not have the power to preempt the states' legislatures for the purpose of securing the implementation of the treaty. Nevertheless, no serious implementation problems have arisen in practice (which may partly be due to the fact that German states have fewer areas of subject matter jurisdiction than do U.S. states).

5. Human Rights

Concerning the status and effect of treaties in domestic law, American and German constitutional law start from the same premises. In both states duly ratified treaties have the rank of ordinary federal legislation-which means that they do not have the rank of constitutional rules. Treaties are enforceable by the courts if they are self-executing. The difference between the systems lies not so much in the constitutional framework but in the extent to which courts recognize norms to be self-executing. This is true, for instance, for human rights treaties. German courts consider that most of the treaty norms which guarantee civil and political rights are self-executing, in particular the European Convention of Human Rights. At one point the German Constitutional Court has even recognized that the fundamental rights which are contained in the (higher-ranking) Constitution should be interpreted in the light of the norms and of the case law of the (lower-ranking) European Convention. Such a benevolent acceptance of treaty rules can lead to court decisions which would probably be intensely debated in the United States. The German Courts have, for instance, recently followed the European Commission of Human Rights in recognizing that the right to private life in Article 8 of the Convention protects illegal aliens against deportation if living in Germany is the only possibility to continue their permanent homosexual relationship with a person lawfully residing in Germany.

There are, however, now also signs which point in the opposite direction. The Federal Administrative Court, for instance, has recently repeatedly refused to accept an important line of judgments of the European Court of Human Rights. According to these judgments, the prohibition of torture and inhuman and degrading treatment in Article 3 of the Convention also protects against deportation to states whose government is unable or unwilling to protect the

applicant against a likely persecution by non-state actors. In one of its decisions (which concerned an applicant from Somalia), the German Court has accused the European Court of an "extensive interpretation of Article 3 which goes beyond the content of the Convention." Although the German Court ultimately protected the applicant against deportation on other grounds, this jurisprudence is a sad development. Perhaps the sea is getting rougher in Germany for the Convention. So far, however, the German legislator and the German courts have always ultimately accepted and implemented the European Courts' jurisprudence. It is true that this jurisprudence has not often cut into cherished national traditions. In Germany, the Convention has raised no issues which are of a political impact comparable to that of the death penalty cases in the United States, with the possible exception of the immigration issues.

6. Exclusion of Self-Executing Character of Treaty Norms

It is rare for the German legislature or the Government to exclude expressly the interpretation of treaty norms as self-executing. There are, however, exceptions. A comparatively minor instance concerned the European Convention on the Law Applicable to Contractual Relationships. This treaty covers a subject-matter that is also regulated by the German Civil Code and the legislature incorporated the treaty rules into legislation amending the code rather than let them operate as self-executing provisions. More importantly, in 1989, the German Government has notified the treaty partners of the Convention against Torture that Article 3 of that Convention would not be self-executing in Germany. Article 3 of the CAT prohibits deportation to States where torture is to be expected. The most problematic case concerns the Convention on the Rights of the Child. Here, the Federal Government took account of the concerns of individual German states and published a notification to the treaty partners according to which the Convention in its entirety is non-self-executing in Germany. It is clear that the legislator and the Government assumed in all three cases that German law sufficiently complied with the obligations of the respective treaties. It is equally clear, however, that the political organs of government did not trust the courts to interpret the treaties directly. Still, express declarations that a treaty norm is not self-executing are still highly unusual in Germany.

7. Effect of Unconstitutional Treaties

If treaty rules or decisions by treaty organs violate norms of the constitution, they are declared inapplicable in both the United States and in Germany no matter whether such a declaration constitutes a violation of the treaty under international law. The German Constitutional Court has assumed the task of ensuring that fundamental rights are not violated by legislation or by treaties. Although, "as a general_rule, the Court will ... go out of its way to reconcile Germany's treaty obligations with its internal legal order," on an occasion it has declared a treaty-provision to be unconstitutional and therefore inapplicable in Germany. The Court, therefore, could conceivably refuse to give effect to an order by the International Tribunal for the Former Yugoslavia to surrender a German citizen. Article 16 (2) of the German Constitution guarantees that Germans not be extradited to foreign countries. It is a matter of

debate whether this provision also applies to international tribunals. As it has done in many other cases, the German Court might seek a harmonizing interpretation.

8. Delegation of 'Sovereign Powers

Despite the described similarities between American and German constitutional law, there is one important difference between the two systems that goes to the heart of the subject-matter. The German constitution contains two provisions (Articles 23 and 24) that explicitly empower the Federal legislator to "delegate sovereign powers." These provisions exist beside the ordinary provision on the conclusion and implementation of treaties. Their purpose is to legitimize a higher degree of integration than is achieved by way of an ordinary treaty. This raises the question of what distinguishes an ordinary treaty regime from one which achieves a delegation of sovereign powers. German courts and constitutional scholars now agree that the answer to this question is not whether the power of the "last cut" has been transferred to the international level. In a sense, every treaty transfers the power of the "last cut." This is true at least for those treaties which contain decision-making procedures which are binding on member states. For German law the specific quality of a "delegation of sovereign powers" consists of the capacity of treaty organs to issue binding norms or orders to individuals without any additional national act of implementation. The term "supranational" is reserved for treaty regimes whose acts have direct effect within the legal order of the member states. The prime examples of such supranational norms or orders are, of course, the EC regulations and decisions.

It is certainly not by accident that Thomas Franck has not chosen the narrow German or European concept of delegation of sovereign powers as the subject of this book. If he would have defined the term "supranational" so narrowly, there would be nothing to talk about since the United States has, so far, not delegated any such sovereign powers to an international organization. This is even true for what is perhaps the most far-reaching delegation of sovereign powers which the United States has so far consented to the instance of the international inspectors under the Chemical Weapons Convention. The United States, under certain circumstances, is under an obligation to grant these inspectors access to specific locations. This does not mean, however, that they have a directly enforceable right to enter the premises regardless of what the U.S. constitution and U.S. federal legislation may say. For the treaty right of access to become valid and enforceable within the United States, 'inspectors must turn to U.S. legal institutions that implement the international obligations, always within the limits of U.S. constitutional law or legislation. The same is true for Germany, where the Chemical Weapons Convention has also been implemented as a simple international treaty. This Convention is, therefore, not considered to have led to a true delegation of sovereign powers (in the narrow sense of the German Constitution).

9. Inspections Under the Chemical Weapons and Under the EC Competition Law Regimes

If the drafters of the Chemical Weapons Convention had wanted to include a right of access which contained some "real" delegation of sovereign powers (in the narrow sense) they

could have conceived the verification regime along the lines of the EC anti-trust or competition law regime. Under the EC competition taw regime EC inspectors also need the assistance of member states authorities if companies oppose the search. In fact, the national authorities must even procure a search warrant from a national court if this is required for a comparable search under national law. The national judge who is competent to issue a search warrant. however, is limited in his power of appreciation by superior Community law. This means that the judge "cannot ... substitute (his or her) ... own assessment of the need for the investigations ordered for that of the Commission, the lawfulness of whose assessments of fact and law is subject only to review by the (European) Court of Justice." It is therefore only within "the powers of the national judge, after satisfying him- or herself that the decision ordering the investigation is authentic, to consider whether the measures of constraint envisaged are arbitrary or excessive having regard to the subject matter of the investigation and to ensure that the (other) rules of national law are complied with in the application of those measures." This delineation of powers, at first sight, does not seem to differ very much from what would actually happen in the case of chemical weapons inspection in the United States. Still, a closer look reveals, that the superior Community law prevents the national judge reviewing the essential aspects of any search; that is, whether there was probable cause and whether the search as such may have been unnecessary or excessive. In Germany, what remains for the national authorities to do is merely to ensure against police excesses and to check whether formalities have been complied with.

10. Protection of Fundamental Rights Against the Exercise of Delegated Powers

Do German fundamental rights offer protection against violation by EC competition inspectors? From the point of view of Community law, such protection is only afforded by Community law itself and the exact content of this law is ultimately determined by the European Court of Justice. German courts may not invoke and apply German fundamental rights law against unreasonable searches and seizures authorized by the EC authorities. In its 1981 *Eurocontrol* decision, the German Constitutional Court, in principle, accepted that when delegated sovereign powers are exercised under a treaty regime to which Germany is a party, their exercise does not require "a system of legal protection ... that equals in every respect, ... the German constitutional system of legal protection." The Court reasoned that to require an identical level of protection against the acts of an international institution would contradict the constitutional decision in favor of international cooperation as it is expressed in Article 24 (1) of the Constitution (the provision which authorizes delegations of sovereign powers). The Court reasoned that insistence on German standards of fundamental rights protection in reviewing the acts of the international regime would be unacceptable to the other states parties and could make Germany incapable of joining treaty-based regimes that require delegation of sovereign powers.

Does this mean that the German Constitutional Court has abdicated its responsibility to ensure that the exercise of sovereign powers in Germany comply with the fundamental rights in the constitution? Could the EC Commission, for instance, legally conduct "fishing expeditions" against a German citizen if this were unobjectionable to the European Court? Certain exercises of delegated sovereign power would go too far, said the Constitutional Court. It explains why the power to transfer sovereign rights cannot be unlimited: "Article 24 (1) of the Basic Law, like

every constitutional provision of such a fundamental nature, must be interpreted in the context of the whole constitution. It does not open a way to modify the basic structure of the constitution. One inalienable part of the constitutional structure is the group of fundamental legal principles that are recognized and guaranteed in the fundamental rights in the Constitution."

This interpretation obviously tries to find a middle ground between two extreme positions, i.e., on the one hand, accepting that Germany has transferred sovereign powers the exercise of which cannot any longer be controlled by reference to its own fundamental rights and, on the other hand, insisting that every international institution must respect German fundamental rights when its actions affect persons in Germany. The idea is that international institutions need not respect all the German fundamental rights as such but that they must at least respect their minimum, essential core. This approach is supported by two arguments, the first of which is somewhat internationalist, the second more nationalist in outlook. The first argument is that when the German Parliament consented to the transfer of sovereign powers, it relied on the treaty partners' expectation that the setting-up of the treaty regime could not possibly have been intended to abolish the fundamental rights protection in that regime's field of activity. This argument can be called the bona fide treaty interpretation argument. It is plausible in itself but it has the weakness that the German Constitutional Court is, in principle, not competent to interpret a treaty. The second argument flows from a specific characteristic of German constitutional law. The German Constitution contains a rule in Article 79 (3) according to which the most fundamental principles cannot be changed even by constitutional amendment. If the most fundamental principles of the Constitution cannot be changed even by constitutional amendment, the argument goes, it follows that such principles equally cannot be abolished by way of a transfer of sovereign powers to an international institution. This argument can be called the inalienability argument. This argument has now received support by the introduction in 1993 of the new Article 23 into the Constitution which makes German participation in the European Union conditional upon certain characteristics of that Union.

11. The Meandering Case Law of the German Constitutional Court

It is hard to disagree with the theoretical starting points of the German Constitutional Court's jurisprudence. It cannot be correct that Germany may unilaterally determine the level of rights protection in the European Communities but it equally cannot be correct that the German constitution permits international institutions to commit serious human rights violations within Germany. But how to determine the right level of right's protection against the acts of a treaty organ and, even more importantly, who determines when the line is crossed? These questions have exercised German and European lawyers since the early 1970s, when the German Constitutional Court started to develop its meandering case law in this area.

In its first decision in 1971, the German Constitutional Court had not yet reached the position which it adopted in the 1981 *Eurocontrol* decision. At that moment the Court declared that "as long as" the European Communities did not possess a codified bill of rights, a meaningful judicial review of those rights, the German Court would continue to ensure that Community legislation and decisions were applicable only if they did not violate the fundamental rights of the German constitution. This decision caused an uproar since it risked destroying the unity of

the Community legal system which would be at the mercy of each national courts' understanding of its national code of fundamental rights. At this juncture, the European Court of Justice, with no human rights code of its own, had barely started to recognize that Community law also included unwritten fundamental rights. Thus, the German Court's "as long as" formula reinforced the European Court's embryonic judicial trend, encouraging the European Court, thereafter, regularly to proclaim adherence to unwritten human rights standards that roughly parallel those of the European Convention on Human Rights.

This development in the European Court's case law, in turn, encouraged the German Constitutional Court to reverse course. In the 1981 Eurocontrol decision, it no longer insisted on imposing precisely the national standard of fundamental rights protection to action by European institutions. Then, in 1987, it declared that "as long as the European Communities, in particular the case law of the European Court of Justice, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities, a protection which can be regarded as substantially similar to the protection of fundamental rights required unconditionally by the (German) constitution . . . the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of (secondary) Community legislation ... and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law."

It is obvious that the two "as long as" decisions cannot be explained by pure logical theory. However, Judge Steinberger, who wrote the draft for the second "as long as" Judgment has suggested that it might conform to a deeper historical wisdom to leave somewhat imprecise exactly which tribunal has the last word on this matter in Germany. Today, it is widely admitted that the dialectical relationship between the German and the European Court has done some good to the European Court of Justice's fundamental rights jurisprudence.

On the other hand, it should not be overlooked that the German Court has formulated a high threshold. It could have merely insisted that the European Court only ensure what cannot in Germany be changed even by constitutional amendment, that is the protection of human dignity and the most fundamental aspects of the rule of law. But the German Court has not merely demanded that this standard be ensured. Instead, the Court requires that the European Court ensure protection on a level which is "substantially similar to the protection of fundamental rights required *unconditionally* by the (German) constitution." Such an ambiguous formula obviously invites parties that have lost at this European level to argue in the German forum that the decision does not "generally ensures" them the required level of protection. And indeed, during the 1990s, forceful appeals have been lodged to persuade the German Constitutional Court to reassert the primacy of German constitutional law over certain areas of European Community law.

12. The Maastricht Decision

In the most prominent of such cases the attack was not against Community law as such, but against the German statute by which the Federal Government had been authorized to ratify the Maastricht Treaty. The applicants asserted that their right to vote would be infringed if the Maastricht treaty became binding. According to them, the new Community law would deprive

Germany of so many areas of jurisdiction that it would be meaningless to vote for a German Parliament which had been deprived of its essential sovereign powers. In a surprising move, the Constitutional Court accepted the basic argument of the appeal but ultimately concluded that the Maastricht Treaty still left enough powers to the German Parliament so that the applicant's right to vote remained meaningful. In its reasoning, however, the Constitutional Court displayed a measure of distrust towards the Community legal order which indicated that, six years after the liberal second "as long as" decision, the wind had turned again. This is not the place to speculate upon the possible reasons for this development. Suffice it to say that the *Maastricht* decision does not formally contradict the Constitutional Court's earlier decisions. It merely pushes them to their logical conclusion in certain areas. If the Constitutional Court is indeed responsible to ensure that the essential content of the German constitution is not sacrificed on the altar of European integration this responsibility cannot remain limited to the area of fundamental rights but it must also extend to the preservation of the essential features of democratic rule.

13. The Banana Dispute

At this point it appears necessary to move from the realm of abstract principles to practice. It is possible to harbor sympathies for the attitude of the German Court in its efforts to balance the need for powerful international regimes with the need to preserve an acceptable level of national protection of citizens' fundamental rights. The problem with this approach is that it depends very much on the sense of proportion of the judges and of the respective legal community German lawyers do not always possess such a sense of proportion. This assertion can be substantiated by the so-called banana cases. It is well-known that the European Community and the United States disagree about whether the EC banana importation regime is and was compatible with the pertinent GATT rules. It is perhaps less well-known in the United States that German banana importers, when seeking the protection of the Courts against the EC banana regime, have not only invoked the GATT rules but that they have also claimed that their (German) fundarnental rights have been infringed. What happened was that the Community enacted a complicated banana importation regime in order to create a uniform internal market. Before this, German importers were free to import bananas from anywhere without paying tariffs. Importers from most other EU-countries, on the other hand, had been confined to import more expensive bananas from certain African, Caribbean, and Pacific (ACP) countries. Under the new regime, the importation of bananas from non-ACP countries was limited to a certain total, which was distributed among member states by a licensing system. Two-thirds of the permissible quantity of non-ACP bananas could be imported by the former importers of non-ACP bananas, one third by former importers of ACP bananas. As a consequence of this regime, German importers lost 30 percent of their non-ACP sources. It is certainly possible to question the economical and political wisdom of this EC banana regime. What is probably hard for an American lawyer to understand is that it sparked the hottest dispute in Germany so far about fundamental rights protection against Community acts. Many German lawyers and some inferior Courts have asserted that the EC banana regime disproportionally interferes with the importers' freedom of professional activity. If I understand the American law correctly, in the United States, such a regulation would only raise questions of equal protection and of

substantive due process, rights which are recognized only to a very limited extent in this particular area. But even if this right were recognized, the question would arise how far the legislator's power of appreciation would extend in this area of regulation of economic activities. German lawyers traditionally insist on a comparatively strict proportionality test while lawyers in most other countries, including the United States, merely demand that, in this area, the legislator pursue a legitimate goal, that the means employed are not clearly incapable of furthering the goal and lastly, that this means not be arbitrary and capricious. Since the goal of creating a single market is legitimate and since this goal necessitates a reduction of previous privileges if the Community wanted to continue its policy of helping the ACP countries, a reduction of the permissible quantity of non-ACP bananas would be acceptable in most systems-at least as long as this measure does not threaten the economic survival of the importers. If this is true, however, it is somewhat preposterous for German lawyers to insist that the EC banana regime is not merely incompatible with the usual fine-tuned German constitutional standard but that it is also a sign that the European Court of Justice does not anymore "generally ensure effective protection" on a level which is "substantially similar to the protection of fundamental rights required *unconditionally* by the (German) constitution."

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Australian & U.S. Federal Policies

1. Consider the following problem about international human rights and federalism. In February 2000 a 15-year-old Aboriginal boy in the Northern Territory of Australia committed suicide in his prison cell. He had been jailed for 28 days for stealing pencils and stationery and breaking a window, under Territory legislation which mandates imprisonment for property offences. In 1997 the UN Committee on the Rights of the Child expressed concern at the legislation and suggested that it was inconsistent with Article 37(b) of the Convention, which requires that detention of a child should only be 'used as a measure of last resort'. The issue was complicated by the reluctance of Australia's Federal Government to use its powers to overrule criminal laws adopted by the Territory legislature. When asked about Australia's compliance with its treaty obligations, Prime Minister John Howard replied:

> Australia decides what happens in this country through the laws and the parliaments of Australia. I mean in the end we are not told what to do by anybody. We make our own moral judgments. … Australia's human rights reputation compared with the rest of the world is quite magnificent. We've had our blemishes and we've made our errors and I'm not saying we're perfect. But I'm not going to cop this country's human rights name being tarnished in the context of a domestic political argument. Now this is a difficult issue. Traditionally these matters are the prerogative of States. And if you have Federal governments seeking to overturn laws of this kind you really are remaking the rule book.

2. Compare the following 1998 Presidential Executive Order in the United States:

> By the authority vested in me as President … it is hereby ordered as follows:
>
> Sec. 1. Implementation of Human Rights Obligations.
>
> (a) It shall be the policy and practice of the Government of the United States, … fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD. …
>
> Sec. 2. Responsibility of Executive Departments and Agencies.
>
> (a) All executive departments and agencies … shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully. …

Sec. 3. Human Rights Inquiries and Complaints

Each agency shall take lead responsibility, in coordination with other appropriate agencies, for responding to inquiries, requests for information, and complaints about violations of human rights obligations that fall within its areas of responsibility. …

…

Sec. 6. Judicial Review, Scope, and Administration.

(a) Nothing in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

(b) This order does not supersede Federal statutes and does not impose any justiciable obligations on the executive branch.

(c) The term "treaty obligations" shall mean treaty obligations as approved by the Senate pursuant to Article II, section 2, clause 2 of the United States Constitution.

(d) To the maximum extent practicable and subject to the availability of appropriations, agencies shall carry out the provisions of this order.