CHAPTER 4

THE EFFECT OF U.S. RATIFICATION AS A “SELF-EXECUTING” OR AS A “NON-SELF-EXECUTING” TREATY

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When the President obtains the Senate’s advice and consent to ratification of a treaty, the treaty is binding on the United States under international law.1 A treaty, thus properly ratified, creates legal obligations upon the United States. However, when a treaty is said to be non-self-executing, any rights that may arise under the treaty can only be enforceable in the United States if there is additional implementing legislation. As Chief Justice John Marshall explained in Foster v. Neilson, there is a critical distinction between self-executing and non-self-executing treaties as a matter of United States domestic law:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as the equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.2

The U.S. Senate has ratified several major international human rights treaties with declarations that the treaties are non-self-executing with respect to domestic implementation.3 While declarations that the treaties

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2 Foster v. Neilson, 27 U.S. 253, 314 (1829). Non-self-executing provisions do not create enforceable rights in federal court unless Congress passes implementing legislation. Courts have found that such treaties govern the rights of sovereign nations rather than the rights of individuals. See, e.g., Raffington v. Cangemi, 399 F.3d 900, 903 (8th Cir. 2005) (because the Convention Against Torture was ratified as a “non-self-executing treaty, there is no direct right of action for violation of the treaty, but only for violation of any domestic law implementing the treaty”).

3 These treaties include the Genocide Convention (ratified in 1988); the International
are non-self-executing may limit or impede the ability of private litigants to enforce these treaties domestically in federal courts, the United States is still obligated under international law to honor the terms of ratified treaties. This obligation is in addition to any independent obligation that the United States may have to honor norms that may reflect customary international law, whether or not that law is also codified in a multinational treaty.4

The use of non-self-executing declarations from the Senate arose during the Carter Administration’s initial attempts to obtain ratification of human rights treaties.5 Some commentators have argued that Senate declarations that a human rights treaty is non-self-executing are invalid for, among other reasons, violating international law restrictions on treaty conditions; being inconsistent with the Supremacy Clause of the U.S. Constitution; and being inconsistent with the government’s responsibility, under domestic and international law, to prevent or prosecute treaty violations.6

*The Restatement (Third) of Foreign Relations Law of the United States* provides three circumstances in which treaty obligations will be deemed non-self-executing:

(1) The agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation;

(2) The Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation; or

(3) Implementing legislation is constitutionally required.7

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6 See, e.g., Bradley & Goldsmith, *supra* note 5, at 401 n.4.