

Michigan Law Review

Volume 48 | Issue 6

1950

INTERNATIONAL LAW-SELF-EXECUTING TREATIES-THE GENOCIDE CONVENTION

William C. Gordon S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [International Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

William C. Gordon S.Ed., *INTERNATIONAL LAW-SELF-EXECUTING TREATIES-THE GENOCIDE CONVENTION*, 48 MICH. L. REV. 852 ().

Available at: <https://repository.law.umich.edu/mlr/vol48/iss6/13>

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

INTERNATIONAL LAW—SELF-EXECUTING TREATIES—THE GENOCIDE CONVENTION—The crime of genocide is committed when a person is harmed because of his nationality, race or religion.¹ Because of the number of offenses committed with genocidal motives during and before the last war,² and the shortcomings of the customary international law rules on the subject,³ the General Assembly of the United

¹ See, in general, LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944); JESSUP, *A MODERN LAW OF NATIONS* 183-184 (1949). Lemkin, "Genocide as a Crime Under International Law," 41 *AM. J. INT. L.* 145 (1947). For historical aspects, see Radin, "International Crimes," 32 *IOWA L. REV.* 33 (1946).

² See JEWISH BLACK BOOK COMMITTEE, *THE BLACK BOOK* (1946).

³ During the Nuremberg Trials, the International Military Tribunal decided, in effect, that only mass extermination carried on during the war was punishable. See OFFICE OF THE UNITED STATES CHIEF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, *NAZI CONSPIRACY AND AGGRESSION* (Opinion and Judgment of the International Military Tribunal) 84 (1947).

Nations unanimously adopted a Convention on Genocide, which has been submitted for ratification by the members, including the United States.⁴

The Genocide Convention has been attacked in several recent articles appearing in the American Bar Association Journal.⁵ The core of the criticism concerns the domestic effect of treaties. The principal arguments advanced by opponents of the Convention can be placed in syllogistic form: (1) The Convention is a self-executing type of treaty, and would become automatically effective as supreme law of the United States.⁶ (2) Other signatory powers would have to take supplemental action before the Convention would apply as their internal law. (3) Therefore, the United States, because of its "unique" constitutional standard,⁷ would be at a comparative disadvantage in signing the Convention. Since the logic of these objections will also be deemed applicable to the Human Rights Covenant⁸ when it evolves into treaty form, an examination of the qualities which mark a treaty as self-executing seems timely.

A. *Tests for Determining the Status of a Treaty Provision as Domestic Law*

As Chief Justice Marshall has said, a treaty is the law of the land and "equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."⁹ It is generally agreed that a treaty is self-executing when no legislation is required

⁴ JOUR. OF THE GENERAL ASSEMBLY, No. A/P.V. 178 at 2-5a (Dec. 9, 1948). The text of the Convention may also be found in DEPT. OF STATE PUB. No. 3416 (1949); 5 U.N. BUL. 1012 (1948); 35 A.B.A.J. 57 (1949); 58 YALE L.J. 1157 (1949).

⁵ See, e.g., Phillips, "The Genocide Convention: Its Effect on Our Legal System," 35 A.B.A.J. 623-5 (1949); 35 A.B.A.J. 288, 360 (1949). See also, White, "Tomorrow One May Be Guilty of Genocide," 12 TEX. B.J. 203 (1949) Cf. Bray and Liebhafsky, 28 MICH. ST. BAR. J. 42 (July 1949).

⁶ U.S. CONST., Art. VI, §2.

⁷ See note 5, *supra*. Cf. Kuhn, "The Genocide Convention and States Rights," 43 AM. J. INT. L. 498 (1949).

⁸ See, for example, Rix, "Human Rights and International Law: Effect of the Covenant on our Constitution," 35 A.B.A.J. 551, 554 (1949). Cf. Kunz, "The United Nations Declaration of Human Rights," 43 AM. J. INT. L. 316 (1949).

⁹ *Foster v. Neilson*, 2 Pet. (27 U.S.) 253 at 314 (1829).

to carry out its provisions.¹⁰ To determine whether legislative action is necessary, the intent of the parties, reflected primarily in the terms of the treaty, must be examined.¹¹

The intent that there shall be legislative implementation must be presumed where the power to deal with the subject matter of the treaty is vested solely in the legislature. For instance, the legislature must execute a treaty involving an outright appropriation of money. But no other type of treaty falls unmistakably within the exclusive domain of Congress.¹²

Intent is also beyond dispute when a treaty expressly stipulates for legislative implementation as a provision that the "powers agree . . . to take, or propose to their . . . lawmaking bodies, the necessary measures for insuring the execution of the present Convention."¹³

Outside of these areas, the cases have not been classified. A cross-sectional analysis should reveal whether or not the courts have charted a consistent course in following Chief Justice Marshall's landmark opinion.

To determine whether uniformity of interpretation exists, a sampling should be made of provisions which the courts have deemed too clear for discussion.

Provisions of an act denying workmen's compensation benefits to nonresident aliens violated a treaty that nationals of either party injured within the territory of the other "shall . . . enjoy the same rights and privileges as are or may be granted to nationals" of the other, and under like conditions.¹⁴

Where a treaty provides that citizens of "each of the . . . Parties

¹⁰ In general, see 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 177 (1943); 5 MOORE, INTERNATIONAL LAW DIGEST 221 (1906); Dickinson, "Are the Liquor Treaties Self-Executing?" 20 AM. J. INT. L. 444 (1926); Reiff, "The Enforcement of Multipartite Administrative Treaties in the United States," 34 AM. J. INT. L. 661 (1940).

¹¹ See, for example, 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 180-183 (1943).

¹² Some writers feel that Congress must implement a variety of treaties. In general, see Anderson, "Treaties as Domestic Law," 29 AM. J. INT. L. 472 (1935). Such contentions have not been borne out by the cases. Concerning penalties, see *United States v. Schooner Peggy*, 1 Cranch (5 U.S.) 103 at 110 (1801); *The Pictonian*, (D.C. N.Y. 1924) 3 F. (2d) 145; *Ex parte Toscano*, (D.C. Cal. 1913) 208 F. 938. As to trade marks, see *Bacardi Corp. v. Domenech*, 311 U.S. 150, 61 S.Ct. 219 (1940). A treaty may even affect revenue matters and be self-executing, so long as money need not be appropriated. For example, most-favored-nation clauses may overcome provisions of previous tariff acts without the need for legislative support.

¹³ *Convention for the Protection of Migratory Birds*, 39 Stat. L. 1702 (Aug. 16, 1916), Art. VIII. See also, *Five Per Cent Cases*, 6 Cust. App. 291 at 328-331 (1915), reversed on other grounds, 243 U.S. 97, 37 S.Ct. 346 (1917).

¹⁴ *Antosz v. State Compensation Commissioner*, 130 W.Va. 260, 43 S.E. (2d) 397 (1947); see also *Vietti v. Mackie Fuel Co.*, 109 Kan. 179, 197 P. 881 (1921).

shall have liberty to . . . reside in the territories of the other to carry on trade,"¹⁵ it was considered self-executing without question.

The self-executing character of a Convention was unchallenged where it provided that consuls "shall enjoy in both countries all the rights . . . which are or may hereafter be granted to the officers of the same grade, of the most favored nation."¹⁶

A provision that a national of one party inheriting realty in the territory of the other party "shall be allowed a term of three years in which to sell" the property¹⁷ was considered self-executing without discussion.

1. *Rejected tests.* Before attempting to filter out common elements present in these cases, several conclusions which may arise upon superficial analysis of the subject may be rejected.

The *nature or purpose of the treaty* is not of substantial importance in determining its self-executing character. When its purpose is easily fulfilled, a treaty would tend to be self-executing more frequently than if the machinery for execution were complex. Thus, the unconditional most-favored-nation clause, exemplified by the first two types of treaties discussed, is typically self-executing.¹⁸ But treaties are not susceptible of classification on the basis of their inherent nature or purpose apart from the limited area in which Congress alone can act. When most-favored-nation clauses were conditional in form, for example, the execution of the condition was frequently left to the legislature.¹⁹ Even a treaty of cession could require legislation, expressly or by implication.²⁰ Therefore, the particular objective for which a treaty is created does not ordinarily limit the freedom of the framers in determining its domestic effect.

The presence of *language of futurity* will not deter the courts from giving immediate effect to a treaty. The language of all the provisions sampled is cast in the future tense.²¹

¹⁵ *Asakura v. Seattle*, 265 U.S. 332, 44 S.Ct. 634 (1924).

¹⁶ *Santovincenzo v. Egan*, 284 U.S. 30, 52 S.Ct. 81 (1931). See also *Dainese v. Hale*, 91 U.S. 13, 23 L. Ed. 190 (1875).

¹⁷ *Clark v. Allen*, 331 U.S. 503, 67 S.Ct. 1431 (1947).

¹⁸ See, for example, *Bill Co. v. United States*, (Cust. & Pat. App. 1939) 104 F. (2d) 67 at 70-71. See in general, 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 180-183 (1943).

¹⁹ See, in general, REPORT BY WICKERSHAM TO LEAGUE CODIFICATION COMMITTEE, L/N pub. C. 205, M.79, 1927 V [1927 v. 10], 22 AM. J. INT. L. SPEC. SUPP. 134 (1928).

²⁰ See, for example, *Foster v. Neilson*, 2 Pet. (27 U.S.) 253 (1829). Ordinarily, a treaty for the cession of territory does not require legislative assistance, and traditional interpretation is of some importance. *De Lima v. Bidwell*, 182 U.S. 1 at 195, 21 S.Ct. 743 (1900).

²¹ See also, *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 at 196, 23 L. Ed. 846 (1876); *Bill Co. v. United States*, (Cust. & Pat. App. 1939) 104 F. (2d) 67.

2. *Common factors.* Two common factors appear which may indicate the formula used by the courts.

The operative language of the sample treaties provides for *future protection* under the terms of the instrument itself or by some machinery incorporated into the treaty. Furthermore, individual rights are protected in all these instances.

Alternatively, a broader test is suggested by the foregoing provisions and by the opinion of Chief Justice Marshall. The *future action* demanded by the terms of the treaties need not be performed by the legislature.

Two cases in particular highlight these two common factors.

In the *Robertson* case,²² a provision that rights of priority as to patents "shall be extended by each of the . . . parties" was denied automatic operation. The protection given individuals by this provision had to await the will of the legislature. Also, further cases show that the test of future protection is too narrow. A provision that "a neutral power which receives . . . troops belonging to . . . belligerent armies shall intern them . . . at a distance from the theater of war" is penal in nature, rather than protective.²³ Yet, it was considered self-executing. This provision also indicates that individual interests are not always at stake in self-executing treaties. Such a treaty may concern national interests as well.²⁴

Does the futurity of legislative action test separate the cases? In the *Bacardi* case,²⁵ the court found self-executing a provision that trade marks "shall be admitted to registration . . . and legally protected in the other . . . States upon compliance with the formal provisions of the domestic law of such States." Individual rights are protected; but unlike the *Robertson* case,²⁶ future legislative action is not necessary. Only individual action is required in complying with the formal prerequisites of domestic law.

3. *Present action.* When a treaty is capable of immediate application, it is self-executing. Use of the present tense furnishes clear evi-

²² *Robertson v. General Electric Co.*, (C.C.A. 4th, 1929) 32 F. (2d) 495. The circuit court of appeals reversed, *General Electric Co. v. Robertson*, (D.C. Md. 1928) 25 F. (2d) 146.

²³ *Ex parte Toscano*, (D.C. Cal. 1913) 208 F. 938. See also, *United States v. Schooner Peggy*, 1 Cranch (5 U.S.) 103 at 110 (1801). *The Pictonian*, (D.C. N.Y. 1924) 3 F. (2d) 145; *Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305 (1933); *United States v. Kearny*, 2 Extraterritorial Case, (U.S. Ct. for China) 665 at 669-671 (1923).

²⁴ See also, *Head Money Cases* (*Edye v. Robertson*; *Cunard S.S. Co. v. Robertson*), 112 U.S. 580 (1884).

²⁵ *Bacardi Corp. v. Domenech*, 311 U.S. 150 at 158, 61 S.Ct. 219 (1940).

²⁶ *Robertson v. General Electric Co.*, (C.C.A. 4th, 1929) 32 F. (2d) 495.

dence of intent to make the treaty automatically operative. For example, a provision that consuls "are authorized to require the assistance of local authorities for the . . . arrest . . . of . . . deserters . . ." was self-executing.²⁷ Even though a provision is cast in apparently future form, the framers of the treaty may contemplate present effectiveness. Thus a provision that grants of land "shall remain ratified and confirmed"²⁸ requires no supporting legislation and is self-executing.

4. *Summary.* The courts appear to follow the test frequently announced, that a treaty is self-executing if it is intended to operate as domestic law without enabling legislation. The most evasive part of this formula used by the courts is the determination of the draftsman's intent. To aid in ascertaining intent, the following classification of treaty provisions is suggested.

Legislative action is clearly demanded where the subject matter of the treaty falls into a category over which Congress has exclusive power or where the treaty calls for legislative implementation by its own terms. Legislation is unnecessary where the terms of the treaty clearly call for immediate operation. A treaty may be self-executing, although it is to become effective at a future date, so long as future action by the legislature is not required in order that the treaty operate as domestic law. Besides the terms of the provision, traditional treatment,²⁹ the expression of executive or legislative views,³⁰ preparatory work,³¹ other provisions of the same treaty, and in some instances, the use of the future tense,³² may aid in determining the intent of the parties.

²⁷ *Tucker v. Alexandroff*, 183 U.S. 424 at 429, 22 S.Ct. 195 (1901).

²⁸ For example, when the Spanish text of the treaty which was denied immediate effect in *Foster v. Neilson*, [2 Pet. (27 U.S.) 253 (1829)] was brought to the attention of the Supreme Court in a later case, the Court speaking again through Chief Justice Marshall decided that the treaty, construed in the light of the Spanish as well as the English text, was self-executing. *United States v. Percheman*, 7 Pet. (32 U.S.) 51 (1833). See also, *United States v. Arredondo*, 6 Pet. (31 U.S.) 691 (1832); *United States v. Garrow*, (Cust. & Pat. App. 1937) (No. 4018) T.D. 48208; 24 Cust. & Pat. App. 410, 88 F. (2d) 318; *Garcia v. Lee*, 12 Pet. (37 U.S.) 511 (1838); *United States v. Schooner Peggy*, 1 Cranch (5 U.S.) 103 at 110 (1801).

²⁹ Traditional interpretation of a type of treaty may exert some influence on the courts. Treaties dealing with patents have never been found self-executing. See, for example, *Robertson v. General Electric Co.*, (C.C.A. 4th, 1929) 32 F. (2d) 495. See also *De Lima v. Bidwell*, 182 U.S. 1 at 195, 21 S.Ct. 743 (1900).

³⁰ For an example of executive view and practice, see *Petition of Georgakopoulos*, (D.C. Pa. 1948) 81 F. Supp. 411; 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 180-184 (1943).

³¹ 2 HYDE, *INTERNATIONAL LAW* 1482-1483 (1945).

³² Courts sometimes speak of language of futurity as a factor, *Robertson v. General Electric Co.*, (C.C.A. 4th, 1929) 32 F. (2d) 495. But if the treaty is to operate only at a future date, the use of the future tense is necessary and is not indicative of intent that the treaty require legislation.

B. *The Convention*

1. *In general.* Although treaties aimed at the elimination of international crimes may require legislation to establish penalties and methods of enforcement, a need for supplementation is not absolute.³³ Therefore, the Convention must be construed to test the major premise of its opponents that the treaty is self-executing.

Substantive provisions begin by defining the crime of genocide and the scope of the Convention.³⁴ The heart of the Convention, Article V,³⁵ is withdrawn from the realm of self-execution by express stipulation. In order to determine whether this stipulation permeates the entire treaty, the structure of the Convention must be further examined.

2. *International enforcement.* Provisions to enforce the international law liability which results whenever a state breaches its treaty obligations act only upon nations.³⁶ They cannot reach within the borders of a state to operate as its internal law.³⁷

3. *Domestic enforcement.* Enforcement on the domestic level is also contemplated.

a. Article V clearly demands legislative implementation by its own terms.

b. Article VI provides that "persons charged with genocide . . . shall be tried by a competent tribunal of the state in the territory of

³³ The United States is frequently a party to agreements for the prevention of international crimes. In addition to extradition treaties, see, for example, treaties entered into for the suppression of obscene publications, U.S. TREATY SER. No. 559 (Dept. of State 1911); for the elimination of white slave traffic, U.S. TREATY SER. No. 496 (Dept. of State 1904); and for the control of opium trade, U.S. TREATY SER. No. 612 (Dept. of State 1913).

³⁴ CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Articles II-IV. See, in general, "Genocide: A Commentary on the Convention," 58 YALE L. J. 1142 (1949).

³⁵ "The contracting parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention, and in particular, to provide effective penalties for persons guilty of genocide. . . ." CONVENTION ON THE PREVENTION AND PUNISHMENT OF GENOCIDE, Article V.

³⁶ Contracting parties may call upon "organs of the United Nations to take such action under the charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide. . . ." CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Article VIII.

"Disputes between contracting parties relating to the interpretation, application, or fulfillment of the present convention, including those relating to the responsibility of a state for genocide, . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Article IX.

³⁷ Only states could initiate action under these provisions. See ECONOMIC AND SOCIAL COUNCIL, Doc. No. E/ 623 at 627 (Jan. 30, 1948). In any event, the sanctions provided can only be used against states. See "Genocide: A Commentary on the Convention," 58 YALE L. J. 1142 at 1148 (1949).

which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to such contracting parties as shall have accepted the jurisdiction. . . ."³⁸ Machinery for trying such cases in our state or federal courts would appear to exist; of course, the usual procedural safeguards of our Constitution would apply.³⁹ In any event, legislative action making genocide a domestic crime is required by Article V before trial could take place. Since this key provision must await the will of the legislature, dependent provisions take on like color.

c. Under Article VII, the contracting parties pledge themselves "to grant extradition in accordance with their laws and treaties in force"⁴⁰ when genocide is committed. Ordinarily, extradition is not granted unless the offense is listed as an extraditable crime. Article VII may have the effect of adding genocide to the group of offenses for which extradition may be granted, obviating the need for formal inclusion by the legislature. Extradition is granted because of the violation of laws of another country, without reference to the requirement of Article V that each country pass legislation making genocide a crime within its own jurisdiction.⁴¹ But even if the provision for extradition is automatically operative, the United States would be obliged to return offenders to the territory in which genocide was committed only where an extradition treaty was in existence.⁴²

C. Conclusion

The opponents of the Convention seem to have misconceived the factors which make a treaty self-executing. Only a narrow segment of the Genocide Convention may be self-executing. Assuming that the treaty were automatically effective, the United States would not neces-

³⁸ CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Article VI.

³⁹ No international penal tribunal has been created. Such a tribunal could not grow out of this Convention without the consent of each party. Article of Raphael Lemkin in 95 CONG. REC. APP. A 1270, A 1271 (Mar. 3, 1949); Dept. of State Pub. 3643 at p. 69, I.O.C.S. III, 39 (1949).

⁴⁰ CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Article VII.

⁴¹ A self-executing construction may fail if sufficient weight is given the preparatory work of the Convention. The United States representative on the Legal Committee said, "Until the Congress of the United States shall have enacted the necessary legislation to implement the convention, it will not be possible. . . to surrender a person accused of a crime not already extraditable under existing laws." See Dept. of State Pub. 3643 at p. 69, I.O.C.S. III, 39 (1949).

⁴² The United States refuses to surrender criminals of another country in the absence of treaty, *Terlinden v. Ames*, 184 U.S. 270 at 289, 22 S.Ct. 484 (1902).

sarily be placed at a comparative disadvantage since the domestic force given to treaties in many nations equals our own, even though no constitutional commandment exists.⁴³

Even if the treaty were immediately operative as domestic law, and such a result were peculiar to the United States, no serious handicap would appear to result.⁴⁴ To be persuasive, criticism of the Convention must be marshalled on more solid ground.

William C. Gordon, S.Ed.

⁴³ See MASTERS, *INTERNATIONAL LAW IN NATIONAL COURTS* (1932); BRIGGS, *LAW OF NATIONS* 432-436 (1938).

⁴⁴ If the United States ratifies the Convention, application of pertinent provisions would not seem undesirable.