# DISCRIMINATION ON THE BASIS OF RESIDENT STATUS AND DENIAL OF EQUAL TREATMENT: A REPLY TO PROFESSOR WEINTRAUB'S RESPONSE

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I am grateful for Professor Russell J. Weintraub's response[1] to my essay on *"Equal Treaty Rights."*[2] His claims and commentary offer an opportunity for clarification and sharpened inquiry concerning the meaning of the right to equal access to courts and to equal treatment in civil proceedings that the Supreme Court of Texas has rightly recognized is guaranteed under at least one treaty of the United States,[3] the International Covenant on Civil and Political Rights (ICCPR).[4] It is clear from his response that Professor Weintraub does not favor equal access and equal treatment and prefers distinctions and discrimination on the basis of resident status. However, the ICCPR necessarily precludes use of such a preference. Other treaties can require a similar outcome.[5]

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1. Russell J. Weintraub, *"Equal Treaty Rights"*: *A Response to Professor Paust*, 27 HOUS. J. INT'L L. 241 (2005).

2. Jordan J. Paust, *"Equal Treaty Rights," Resident Status & Forum Non Conveniens*, 26 HOUS. J. INT'L L. 405 (2004).

3. Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82–83 (Tex. 2000).

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, ratified by the United States Sept. 8, 1992) [hereinafter ICCPR].

5. For examples of other treaties that might be at stake in a given case, see those discussed in Jordan J. Paust, *"Equal Treaty Rights" Under the Texas Open Forum Act*, 60 TEX. BAR J. 214, 216–17, 220 (1997) [hereinafter Paust, *Texas Open Forum Act*].

## I. THE REACH OF ARTICLES 2, 3, 14, AND 26 OF THE ICCPR AND THE MEANING OF "OTHER STATUS"

The ICCPR cannot rightly be interpreted to allow distinctions or discrimination on the basis of resident status. First, Article 2(1) of the ICCPR unavoidably ensures rights under the treaty "to all individuals" within a state's territory or subject to its jurisdiction and guarantees such rights to all persons "without distinction of any kind."[6] Distinctions based on an individual's residency necessarily violate the treaty's reach "to all individuals" and necessarily involve a "distinction of any kind." This conclusion is unavoidable whether or not resident status as such fits within the phrase "other status," which appears at the end of Article 2(1). Second, the specific categories listed in Article 2(1), among which "other status" is found, are merely listed by way of example. They expressly follow the treaty's phrase "such as" and are therefore clearly "mentioned rather for example than by way of exclusion"[7] – a circumstance known to obviate application of a rigid *ejusdem generis* doctrine.[8] Moreover, if one sought to apply the *ejusdem generis* doctrine to the full reach of Article 2(1), what would be "the genus" of the "special words" found in the "such as" examples of impermissible distinction? Since the "special words" or categories are merely set forth by way of example, the logical conclusion must be that "the genus" relates to "all individuals" and to the prohibition of a

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6. ICCPR, *supra* note 4, art. 2(1).

7. The language quoted is from *The Med Guds Hielpe*, 1 Eng. Prize Cases 1 (1745), a case recognized in LORD MCNAIR, THE LAW OF TREATIES 399 (1961).

8. *See, e.g.*, MYRES S. MCDOUGAL, ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 203 (1967); Paust, *Texas Open Forum Act*, *supra* note 5. More generally, McNair has been cited rarely in U.S. courts and, to my knowledge, never for use of *ejusdem generis*. The doctrine seems to be rarely relevant to treaties. *See, e.g.*, MCNAIR, *supra* note 7, at 393 (merely "some degree of recognition" regarding treaties); Weintraub, *supra* note 1, at 245 n.24 (citing a 1958 district court opinion). The doctrine has often been disfavored, limited, or rejected with respect to treaty interpretation. *See, e.g.*, MCDOUGAL, ET AL., *supra*, at 203–04, 206, 367. As the U.S. Supreme Court stated, it is "at most" a rule of construction "to be resorted to as an aid only when words or phrases are of doubtful meaning." Factor v. Laubenheimer, 290 U.S. 276, 303 (1933). Concerning additional recognitions in *Factor* with respect to the need to construe treaties broadly in favor of express and implied rights, *see, e.g.*, 290 U.S. at 293–94; Paust, *supra* note 2, at 405–06 & n.4.

"distinction of any kind." As noted, a denial of rights to nonresidents violates the guarantee to "all individuals" and constitutes a prohibited use of a "distinction of any kind." Thus, the prohibition of a distinction based on residency is logically related to "the genus." Moreover, each specific category listed by way of example can be a form of status, like resident status, and some involve geographic or social relations, like resident status. Thus, even the specific categories exemplified, including "other status," are logically related to resident status.

Third, the rights listed in Article 26 of the treaty to be "equal before the law," to be "entitled without any discrimination to the equal protection of the law," and to freedom from "discrimination on any ground" are treaty-based rights of "all persons."[9] Thus, necessarily, distinctions based on resident status would violate the reach of rights and guarantees of all persons that are set forth in Article 26. Importantly, the phrase "other status" that is contained in Article 26 appears among a list of categories following the phrase "such as." Thus, like the listing in Article 2, each specific category of impermissible discrimination listed in Article 26 is set forth by way of example and none are set forth by way of exclusion.

Fourth, the requirements of equal rights and equal protection are mirrored in Articles 3 and 14(1) of the ICCPR .[10] Indeed, Article 14(1) expressly mandates: "[a]ll persons shall be equal before the courts and tribunals . . . [and] everyone shall be entitled to a fair and public hearing."[11] As noted in my prior essay, the Supreme Court of Texas rightly affirmed that Article 14(1) "'requires . . . the right of equality before the courts . . . [,] equal treatment in the signatories' courts, . . . [and] equal access to these courts . . . [as well as] equal treatment in civil proceedings.'"[12]

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9. ICCPR, *supra* note 4, art. 26.

10. See *id*. arts. 3, 14(1); *see also id*. pmbl. ("equal . . . rights of all members of the human family"); Paust, *supra* note 2, at 406 & n.5.

11. ICCPR, *supra* note 4, art. 14(1).

12. Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82–83 (Tex. 2000), *quoted in* Paust, *supra* note 2, at 405.

## II. PROPER TREATY INTERPRETATION

Fifth, the U.S. Supreme Court and other U.S. federal and state courts have long recognized that treaties are to be construed in a broad manner and in favor of express and implied rights.[13] In contrast, misapplication of a rigid *ejusdem generis* doctrine to deny freedom from distinctions and discrimination on the basis of resident status would result in a denial of both express and implied rights under treaty law of the United States. Additionally, an attempt to add limiting words to the ICCPR that the treaty makers did not choose, such as "irrational," as if the treaty denies merely irrational distinctions or irrational discrimination, would violate the express reach of rights under the treaty "to all individuals," the express right to freedom from a "distinction of any kind," the express right to freedom from discrimination "on any ground," the express right of "[a]ll persons" to be "equal before the courts," the express right of "all persons" to be "equal before the law," and obviously would not comply with the venerable judicial rule of construction that treaties are to be construed in a broad manner to protect express and implied rights.

Moreover, treaties are to be construed in a manner that serves the "object and purpose" of the treaty and with reference to "the ordinary meaning" or common meaning of its terms.[14] Clearly, the major purpose of the ICCPR is to provide effective human rights to all human beings and the ordinary meaning of "all individuals," "all persons," and "everyone" necessarily covers nonresident persons. Clearly also, the ordinary meaning of the prohibitions of a "distinction of any kind" and "discrimination on any ground" contained in Articles 2(1) and 26 covers distinctions and discrimination on the basis of resident status. Similarly, the inclusive listing of "other status" among the forms of impermissible distinction and discrimination will, according to the ordinary meaning of "other status," necessarily cover

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13. *See, e.g.*, cases cited in Paust, *supra* note 2, at 405–06 n.4, including *Dubai Petroleum Co.*, 12 S.W.3d at 80.

14. *See, e.g.*, Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(1), 1155 U.N.T.S. 331; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) & cmt. a (1987).

resident status.

The requirement that the ordinary meaning of treaty terms be used assures that a common or shared meaning will prevail and that a hidden, arcane, unilateral, or distorted meaning will not guide inquiry.[15] This is one reason why inquiry into the common or ordinary relationship that exists between use of the terms "resident" and "status" can be informative.[16]

## III. SUPPOSED SUSPICION AND ALLEGEDLY RATIONAL DISCRIMINATION

Professor Weintraub also alleges that discrimination on the basis of resident status might sometimes be "rational" in view of a supposed "common sense suspicion"[17] and should be allowed in some cases. Whether or not this is correct, the treaty's prohibitions of a "distinction of any kind" and "discrimination on any ground," like the rights and protections that exist for "all individuals" and "all persons," are phrased in the absolute. Thus, there is no room for supposed suspicion and allegedly rational distinctions or discrimination on the basis of resident status. In any event, one can question whether the Texas scheme that precludes any *forum non conveniens* inquiry with respect to any "legal resident" of Texas is "rational" and policy-serving – a point that Professor Weintraub nearly admits.[18]

That federal courts have used residency as a factor regarding ordinary common law *forum non conveniens* inquiry before the United States ratified the ICCPR and later without adequate briefing on and consideration of the treaty's absolute rights and prohibitions and the primacy of treaty law over mere common law is beside the point,[19] especially in view of the express mandate in the Supremacy Clause of the U.S.

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15. *See generally* JORDAN J. PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 57–69 (2000).

16. *See, e.g.*, Paust, *supra* note 2, at 408 n.12; *but see* Weintraub, *supra* note 1, at 242-43.

17. *See* Weintraub, *supra* note 1, at 244.

18. *See id*. at 252 ("may be" "monumentally silly").

19. This is particularly true with respect to *Pollux Holding Ltd. v. Chase Manhatten Bank*, 329 F.3d 64, 72–73 (2d Cir. 2003), which did not even address the ICCPR.

Constitution that state judges are bound by all U.S. treaties as supreme law of the United States.[20] That lawyers need to be more familiar with the treaty's reach and to adequately brief federal and state courts in the future is regrettably true, but this also is beside the point.

## IV. FOOTNOTED DOCUMENTS

### *A.* Darby *and the European Convention and Protocol No. 1*

With respect to *Darby v. Sweden*,[21] the European Court of Human Rights construed a different treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),[22] while taking into account different treatment accorded persons who were registered as residents of Sweden and those who were not. Professor Weintraub's quote from the European Court's opinion does contain broad language that indicates that, in Europe, under the European Convention, conduct might not be labeled as discriminatory if it reasonably serves a legitimate aim.[23] However, the issues were more complex and involved other provisions of European treaty law. In context, the European Court also had to consider the nature of Darby's property interests in connection with Article 1 of Protocol No. 1 to the European Convention,[24] which recognizes that "No one shall be deprived of his possessions *except in the public interest* and subject to the conditions provided for by law," and also recognizes "the right of a State to enforce such laws as it deems necessary to control the use of property *in accordance with the general interest* or to secure the payment of taxes . . .,"[25] thus providing the basis for an inquiry into offsetting "public" and

20. U.S. CONST., art. VI, cl. 2.

21. Darby v. Sweden, 13 Eur. Ct. H.R. 774 (1990).

22. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

23. See *Darby*, 13 Eur. Ct. H.R at 781, *quoted in* Weintraub, *supra* note 1, at 246-47. *See also infra* note 26; *infra* text at notes 27–28.

24. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol No. 1].

25. *Id*. art. 1 (emphases added).

"general" interests at stake. The section heading of the Courts' opinion in this regard expressly recognized the interconnection between the provisions in the following words: "Alleged violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1."[26] "Darby claimed that the refusal to grant him an exemption from the impugned part of the church tax on the ground merely that he was not formally registered as a resident . . . amounted to a discrimination in comparison with other non-members of the Church who were so registered."[27] While considering both Article 14 of the European Convention and Article 1 of Protocol No. 1, the European Court seemed to stress that there were no reasonable offsetting public or general interests concerning the property interests of those who were registered and those who were not registered.

More generally, the European Court has adopted a particular interpretive approach to the European Convention that does not follow the restrictive language of Article 14 of the Convention[28] but sometimes allows inquiry into a "legitimate aim" (that can beg the question) and whether the "means employed" are "proportionate."[29] Thus, under this particular approach the European Court can play an Alice-in-Wonderland game by finding that discrimination in some instances is not "discrimination." It seems then that Professor Weintraub's preference might be possible in some instances in a European country *if* the means employed (that is, discrimination on the basis of residency) is concluded to be "proportionate" to a "legitimate" aim. Yet, why discrimination on the basis of residency would ever be "legitimate" when a treaty seeks rights and protections for all persons is a fundamental question. I do not believe that the claim that a state has a supposed "suspicion" that some nonresidents could be "forum shopping"

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26. *Darby*, 13 Eur. Ct. H.R at 780.

27. *Id*. at 780–81.

28. European Convention, *supra* note 22. Moreover, unlike the ICCPR, the European Convention does not contain an express prohibition of a "distinction of any kind" concerning rights. ICCPR, *supra* note 4, art. 2.

29. *See* JACOBS & WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 350–52 (Clare Ovey & Robin C.A. White eds., 3d ed. 2002) (discussing *Belgian Linguistic* case, 1 Eur. Ct. H.R. (ser. A) 252, 284 (1968)).

will be sufficient. Moreover, would the means used (that is, discrimination against nonresidents) be "proportionate" to the aim if residents also "forum shop"? Indeed, does the fact that residents "forum shop" deny legitimacy of the aim?[30] Of course, in any event, Texas is not a European country.

### *B. The 1996 Committee Report*

The 1996 Report of the Human Rights Committee was cited as an italicized "see" citation.[31] The Report set forth the observations of the Committee regarding the Simunek Communication, noting the end result that legislative conditions based on citizenship or residence "had effects upon the . . . [claimants] that violate their rights under Article 26 of the" ICCPR.[32] The extract of the Committee's observations quoted by Professor Weintraub presents an ambiguity: What was the ultimate focus of the quoted language? Was it a focus primarily on the scope of protectable "property," that is, on the fact that the scope of entitlement to "original" property interests was "not predicated either on citizenship or residence," but newer legislation concerning restitution had denied such property interests on the basis of citizenship or residence, that this amounted to an "unreasonable" taking of property, and that the new legislation therefore constituted a confiscatory set of restrictions of property interests that was impermissible? The Committee stated that "the right to property, as such, is not protected under the Covenant," adding: "[h]owever, a confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a

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30. Professor Weintraub would allow a measure of some equality in his ultimate "position," since he would allow nonresident U.S. citizens to be discriminated against just like non-resident foreign citizens are discriminated against. *See* Weintraub, *supra* note 1. However, his stated "position" prefers discrimination between nonresidents and residents. *Id*. Later, he states that he is "not in favor" of preclusion of *forum non conveniens* inquiry under the Texas legislative scheme with respect to Texas residents and intimates that the Texas scheme may be "monumentally silly." *Id*. Does his disfavor relate to a need for equality? If so, even in Europe, would the aim, means and proportionality of such a legislative scheme be clearly suspect?

31. Paust, *supra* note 2, at 408 n.15.

32. *Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 50th Sess., Supp. No. 40, vol. II, at 96, U.N. Doc. A/50/40 (1999).

breach of the Covenant if the relevant act or omission was based on discriminatory grounds . . . [and, yet,] the confiscations themselves are not here at issue, but rather the denial of a remedy to the" claimants.[33] It seems that the issues became intertwined. Just prior to the language quoted by Professor Weintraub, the Committee also stated: "The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions."[34] Whatever the ultimate focus, the quoted language does not declare more generally that discrimination on the basis of citizenship or residence that is reasonable would be permissible.

### *C. General Comment No. 23*

I used General Comment No. 23 in a "see also" cite,[35] knowing that it is of some relevance but is not directly on point or determinative. The General Comment addressed a special and potentially qualifying term found within Article 27 of the ICCPR, the word "exist." The Human Rights Committee refused to limit minority rights contained in Article 27 despite the potentially limiting requirement contained in the phrase "[i]n those States in which" certain minorities "exist."[36] The Committee merely provided a conclusion that "[g]iven the nature and scope of the rights" in Article 27, "it is not relevant to determine the degree of permanence that the term 'exist' connotes" and also concluded that "[j]ust as they need not be nationals or citizens, they need not be permanent residents."[37] Thus, resident status was considered; nationality, citizenship, and residency were equated; residents "exist" within a state within the meaning of Article 27; and it was not relevant that a special term (that is, the word "exist") might logically connote some limitation within Article 27 as such that could be based on a "degree of permanence." Moreover, a rational limitation was

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33. *Id*. at 95–96, ¶¶ 11.3–11.4.

34. *Id*. at 96, ¶ 11.6.

35. Paust, *supra* note 2, at 408 n.15.

36. *See* ICCPR, *supra* note 4, art. 27.

37. *See General Comment No. 23*, U.N. GAOR, Hum. Rts. Comm., 50th Sess., at 38–39, U.N. Doc. HRI/gen/1/Rev.1 (1994).

not acceptable. In any event, Professor Weintraub's claim that General Comment No. 23 somehow shows that "discrimination on the basis of residence" does not violate the ICCPR, but only "discrimination that has no basis except irrational prejudice"[38] seems disconnected.

## V. THE SENATE'S "UNDERSTANDING"

It is correct that the U.S. Senate "understanding" in connection with the ICCPR assumed that listed "distinctions" would be "permitted when such distinctions are, at [a] minimum, rationally related to a legitimate governmental objective,"[39] but the understanding is unavoidably inconsistent with express language in Article 2 prohibiting a "distinction of any kind."[40] It is also unavoidably inconsistent with other words of the treaty, including other express rights, and with the object and purpose of the treaty.[41] As noted, under international law the words and object and purpose of the treaty will control.[42] Additionally, a unilateral "understanding" as such is not binding on other signatories to a treaty. Domestically, it is not binding on the Executive[43] or the judiciary and it is the judiciary that

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38. *See* Weintraub, *supra* note 1, at 249-50.

39. *See* 138 CONG. REC. 8071 (1992).

40ICCPR, *supra* note 4, art. 2(1).

41. *Compare supra* Part II.

42. *See* Vienna Convention on the Law of Treaties, *supra* note 14, art. 31(1); RESTATEMENT, *supra* note 14, § 325(1) & cmt. b.

43. Where it does not conflict with the text and object and purpose of a treaty, an understanding can be useful for interpretive purposes if it also reflects the expectations of a majority of the other signatories to the treaty. RESTATEMENT, *supra* note 14, § 313 & cmt. g. Today, understandings are often offered by the Executive for consideration by the Senate and, if approved by the Senate, are made part of the instrument of ratification signed by the President if the President subsequently agrees to ratify. *See* Kevin C. Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM J. INT'L L. 854, 866–67 (1986). However, they are "understandings," and once the treaty is ratified, they are not subsequently binding on the President. *See, e.g.*, Abraham Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986); *cf.* RESTATEMENT, *supra* note 14, § 314(2) (setting forth the uncontroversial point that "if he makes the treaty, [the President] must do so on the basis of the Senate's understanding") & cmt. d (suggesting without other authority that an understanding "becomes effective in domestic law . . . subject to that understanding"); *but see* Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty:*

has the power and responsibility to interpret treaties in cases before the courts.[44] The judiciary, addressing the text and object and purpose of the treaty as well as the venerable rule of construction designed to protect express and implied rights under a treaty, should be unpersuaded by the Senate understanding.

## VI. THE DECLARATION OF PARTIAL NON-SELF-EXECUTION

Professor Weintraub misses the point that the declaration of partial non-self-execution with respect to the ICCPR is expressly limited and has a special meaning. First, it is not a general declaration of non-self-execution. It merely addresses Articles 1-27 and expressly does not apply to Article 50. Article 50 reaches back to all "[t]he provisions" of the ICCPR and mandates in clear terms: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."[45] Such "shall" language is mandatory and self-

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*The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956, 1970 (1986). A subsequent interpretive resolution of the Senate is clearly not binding. *See, e.g.*, Fourteen Diamond Rings v. United States, 183 U.S. 176, 180 (1901). Moreover, treaties can have an evolved meaning. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 14, art. 31(3)(a)–(c); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) (the United States is "bound to receive the law of nations, in its modern state"); Kadic v. Karadzic, 70 F.3d 232, 238, 241 (2d Cir. 1995); Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd* 488 U.S. 428 (1989); Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003); RESTATEMENT, *supra* note 14, § 325(2); PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 61 n.103, 232, 311 n.562, 388 n.64 (2d ed. 2003). Thus, the meaning of a treaty (as with a federal statute) can evolve beyond or be different from an original unilateral understanding of the U.S. Senate.

44. *See, e.g.*, Nielson v. Johnson, 279 U.S. 47, 52 (1929); Jordan v. Tashiro, 278 U.S. 123 (1928); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Jones v. Meehan, 175 U.S. 1, 32 (1899) ("The construction of treaties is the peculiar province of the judiciary"); Wilson v. Wall, 73 U.S. (6 Wall.) 83, 89 (1867) ("The construction of them is the peculiar province of the judiciary"); Ware v. Hylton, 3 U.S. (3 Dall.) at 239–40, 249, 253–54, 283; RESTATEMENT, *supra* note 14, §§ 112, 113, 326(2) & cmt. b; PAUST, ET AL., *supra* note 15, at 171; *see also* Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348–49 (1809) ("The reason for inserting that clause in the constitution [Art. III, § 2] was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals . . . . Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.").

45. ICCPR, *supra* note 4, art. 50. The next few paragraphs are borrowed in part

executory. Moreover, the Executive Explanation concerning the Covenant assured that there was no intent to limit Article 50's reach and expressly recognized:

> In light of Article 50. . ., it is appropriate to clarify that. . .*the Covenant will apply to state and local authorities*. . .the intent is *not to modify or limit U.S. undertakings* under the Covenant. . . . [It is] intended to signal to our treaty partners that the U.S. *will implement* its obligations under the Covenant *by appropriate* legislative, executive, and *judicial means, federal or state*. . . ."[46]

Second, the Supremacy Clause of the U.S. Constitution expressly mandates that "*all* Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,"[47] not that some treaties or only wholly or partly self-executing treaties have that effect. In that sense, the U.S. Constitution executes any treaty for supremacy purposes and the constitutional mandate is consistent with the express mandate in Article 50 of the treaty. Moreover, as the Supreme Court emphasized with broad language in *United States v. Pink*,[48] "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty . . . [and] must give way before the superior Federal policy evidenced by a treaty. . . ."[49]

Third, the declaration has a special meaning. The intent was

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from PAUST, *supra* note 43, at 361–62.

46. *See* S. REP. NO. 102–23, at 17–18 (1992), *reprinted in* 31 I.L.M. 645, 656–57 (emphasis added) [hereinafter Executive Explanation].

47. U.S. CONST., art. VI, cl. 2 (emphasis added).

48. United States v. Pink, 315 U.S. 203 (1942).

49. *Id*. at 230–31. *See also* PAUST, *supra* note 43, at 362, 381 n.7 (listing cases discussing supremacy). Additionally, the Tenth Amendment is no barrier and assures supremacy of all treaties because the treaty power is expressly "delegated to the United States" and "prohibited. . .to the States. . . ." *See* U.S. CONST., amend. X; *see also id*., arts. I, § 10, II, § 2, VI; Reid v. Covert, 354 U.S. 1, 18 (1957) ("the people and the States have delegated their [treaty] power to the National Government and the Tenth Amendment is no barrier."); Missouri v. Holland, 252 U.S. 416, 432 (1920) ("by Article II, § 2, . . .is delegated expressly, and by Article VI treaties. . .are declared the supreme law of the land.").

merely to clarify that the Covenant would not be used directly to "create a private cause of action"[50] and, thus, was not to preclude other uses of the treaty, including use defensively or, as the U.S. Constitution mandates in any event, use for supremacy and preemptive purposes.[51] Use of the ICCPR to obviate impermissible distinctions and discrimination in the Texas legislation concerning application of *forum non conveniens* inquiry would not be use of the treaty directly to create a cause of action. The short quote from the Supreme Court's opinion in *Sosa v. Alvarez-Machain*[52] does not address use of the treaty for supremacy or preemptive purposes and does not address any of the three points made above. To my knowledge, the Court in *Sosa* was not briefed on and did not consider any of these points, for example, (1) that the declaration is partial and expressly does not reach Article 50, as recognized by the Executive, (2) that the mandate of Article VI, clause 2 of the U.S. Constitution that "all" treaties shall be supreme law of the land controls, and (3) that the declaration has a special meaning that would not preclude uses other than direct use to create a cause of action. Failure to brief the Court on these three points would involve inadequate briefing had the issues before the Court involved inconsistent state law and the mandate of the Supremacy Clause, but they did not.[53]

## VII. CONCLUSION

In conclusion, the terms of the ICCPR considered in light of its object and purpose control. As noted, the rights and prohibitions contained in Articles 2(1), 3, 14, and 26 of the treaty

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50. *See* Executive Explanation, *supra* note 46, at 19, *reprinted in* 31 I.L.M. at 657 ("*The intent* is to clarify that the Covenant will *not create a private cause of action* in U.S. courts.") (emphasis added).

51. *See, e.g.*, United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000); United States v. Duarte-Acero, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001); United States v. Bakeas, 987 F. Supp. 44 (D. Mass. 1997); PAUST, *supra* note 43, at 361–62, 379–80 n.2; PAUST, ET AL., *supra* note 15, at 75–76, 190, 193–94.

52. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004) (the ICCPR "did not itself create obligations enforceable in the federal courts").

53. Inadequate briefing would also occur if self-execution was raised concerning use of the ICCPR in a federal court and point numbers one and three were not addressed.

are expressly set forth in the absolute. They prohibit distinctions and discrimination of any kind. Thus, they do not allow supposedly rational distinctions or discrimination on the basis of residency. As the Supreme Court of Texas has affirmed, the ICCPR guarantees equal access to courts and equal treatment in civil proceedings.[54] Additionally, U.S. courts have long recognized that treaties are to be construed in a broad manner in favor of express and implied rights. Attempts to add limiting words that the treaty makers did not choose would violate such a venerable rule of judicial construction.

54. *See* Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82–83 (Tex. 2000).