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Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights

Jordan J. Paust*

It was a sad day in American legal history when President Bush reiterated previously suggested reservations, understandings, and declarations concerning the 1966 International Covenant on Civil and Political Rights (Covenant), and sadder still when the U.S. Senate, so miserably compliant with the Executive and its failed leadership, unquestionably accepted the Bush Administration's declaration that the treaty should not be self-executing. This is not worth celebrating. Rarely has a formal attempt at adherence to a treaty been so blatantly meaningless and so openly defiant of its terms, the needed efficacy of its norms, and the very possibility of its direct application as supreme law of the land. And yet this wretched practice ultimately will not prevail. It comes twenty-six years too late to defy a growing normative influence of the treaty and the claims, already millions strong, to basic and effective human rights.

In its "explanation" of the suggested declaration on non-self-execution, the Executive disclosed its "intent...to clarify that the

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3. See Senate Comm. on Foreign Relations, supra note 1, at 18, 23, reprinted in 31 I.L.M. at 657, 659 ("[T]he intent is not to modify or limit U.S. undertakings under the Covenant but rather to put our future treaty partners on notice with regard to the implications of our system concerning implementation."). Too often one heard the tired ploy of the Executive that several senators and their staff were politically opposed to meaningful ratification and the president was simply unable to provide effective national leadership to change or overcome such an inhibiting will. See also infra notes 113-15 (exploring Senate reaction to the treaty). Nonetheless, reality partly is what we make of it.
Covenant will not create a private cause of action in U.S. courts." 4 Not only is such a policy anathema to the very notion of human rights as rights of individual human beings, 6 and thus destructive of

4. See Senate Comm. on Foreign Relations, supra note 1, at 19, reprinted in 31 I.L.M. at 657. Because of the perceived thrust of this policy and other comments by former members of the Executive branch, see infra notes 114-15, I assume, perhaps (and I hope) incorrectly, that "non-self-execution" was intended by some to be basically a policy of non-execution of the human rights documented within the Covenant, but there can be a subtle difference between "non-self-execution" and non-execution. See infra notes 93-97 and accompanying text (considering the non-self-execution provisions of the Covenant). Here, I address "non-self-execution" as a policy primarily of non-execution. I assume that the Bush Administration's policy was part of an attempt to assure that the Covenant will "not create a private cause of action in U.S. courts;" Senate Comm. on Foreign Relations, supra note 1, at 19, reprinted in 31 I.L.M. at 657 (emphasis added), that is, directly. Furthermore, I assume that an attempt also was made to assure that a cause of action for a violation of the human rights documented in the Covenant will not be allowed unless a prior or future federal statute somehow creates or implements a right of action. But see Senate Comm. on Foreign Relations, supra note 1, at 18, reprinted in 31 I.L.M. at 657 (stating that the United States will implement its obligations under the Covenant through the legislature, the judiciary, and the Executive branches). This position is actually untenable under our Constitution with respect to constitutionally-based or constitutionally-mirrored rights. See infra notes 93-98 and accompanying text (analyzing non-self-execution under the U.S. Constitution).

It also may have been that use of such a precise expression concerning merely "a private cause of action" was meant to save direct and private use of the rights documented in the Covenant as a defense in civil or criminal matters, in restraint elsewise of incompatible governmental power, or in other ways, but such is not clear when the more general limitation, i.e., the rights and provisions "are not self-executing," was also used. See also Frank C. Newman, United Nations Human Rights Covenant and the United States Government: Diluted Promises, Foreseeable Futures, 42 DePaul L. Rev. 1241 (1993); Ruth Wedgwood, Remarks, 85 Proc. Am. Soc. Int'l L. 139, 141 (1991) (suggesting that the United States allow self-execution when utilized "in defense").

Additionally, it may have been the intent of the Bush Administration merely to state that the Covenant itself will not directly create a private cause of action, while recognizing implicitly that the Covenant can continue to be used in private cases arising under or through the Constitution or federal statutes and that the Covenant, in conjunction with such other laws of the land, can be used by the judiciary to help create, recognize, and/or define a cause of action. See infra notes 85-87, 93-98, and accompanying text. But see infra notes 114-15. An earlier draft of this declaration by the Carter Administration stressed that the Covenant should not be "directly enforceable," but that "further implementation" could be left to the legislative "and judicial process." See Message from the President Transmitting Four Treaties Pertaining to Human Rights, 14 Weekly Comp. Pres. Doc. 395 (Feb. 23, 1978); S. Exec. Docs. C, D, E, F, 95th Cong., 2d Sess. viii, xi, xv, xviii (1978) (emphasis added) (submitting four human rights treaties to the Senate for advice and consent). Others had apparently assumed that President Carter's proposal was not a policy of non-execution, even primarily, and that such a non-self-execution policy would not be incompatible with the object and purpose of the treaty (a second assumption that one might still question). See Yuji Iwasawa, The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis, 26 Va. J. Int'l L. 627, 669, 670 n.200 (1986). Yet the Carter language is missing from the Bush Administration's explanation. See Senate Comm. on Foreign Relations, supra note 1, at 19, reprinted in 31 I.L.M. at 657 (adding nonetheless: "[E]xisting U.S. law generally complies with the Covenant . . ."); id. at 18, reprinted in 31 I.L.M. at 657 (adding in a paragraph preceding this remark: "the U.S. will implement its obligations under the Covenant by appropriate legislative, executive and judicial means . . .") (emphasis added)).

the very object and purpose of a human rights treaty, but it is also in direct conflict with the customary right of each person to an effective remedy in domestic tribunals and in conflict with express undertakings in Articles 2, 9, 14, and 50 of the Covenant. Additionally, it is inconsistent with the Preamble and Articles 4 and 5 of the Covenant. Article 2, paragraph 3, subparagraph (a) of the Covenant affirms the customary and quite necessary right to an effective remedy while expressly setting forth the obligation of each signatory "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." President Bush's non-self-execution declaration was apparently intended to gut this critical obligation of any meaningful effect and, thereby, to gut the right of individuals to an effective remedy. Indeed, how can the Executive ensure that persons have an effective remedy if there is to be no private cause of action under the Covenant?

Non-self-execution also would be fundamentally at odds with subparagraph (b) of Article 2, paragraph 3, which imposes additional obligations "[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop [further] the possibilities of judicial remedy." If such rights to an effective remedy are dependent upon future implementing legislation (which may or may not occur) because of this sort of Executive action (i.e., the stated policy of non-self-execution) and/or later inaction of the Executive branch, it is clear that the Executive branch could not in good faith be attempting to ensure that there shall be an effective determination of such rights by competent bodies in cases or matters otherwise properly before them, nor could it be attempting to ensure that there will be further development of judicial remedies. Additionally, a policy of non-self-execution would be fundamentally inconsistent with the obligation in subparagraph (c) of

543, 611-18, 645 n.593, passim (1989) (identifying the fundamental right to a remedy); infra notes 30, 33-35, 37, and accompanying text (examining the Covenant's object, purpose, and requirement that parties provide a domestic law remedy).

6. See, e.g., Paust, supra note 5, at 611-28, 644-45 (discussing the customary right to an effective remedy).

7. ICCPR, supra note 2, art. 2, 999 U.N.T.S. at 174 (emphasis added).

8. Id.
paragraph 3 "[t]o ensure that the competent authorities shall enforce such remedies when granted."9 Clearly also, implementation of a policy of non-self-execution would make it impossible for the United States to comply with the obligation in paragraph 1 of Article 2 "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the"10 Covenant. Thus, the Executive's stated policy is unavoidably at odds with five primary obligations contained in Article 2 and with the very notion of human rights as real rights of real human beings, a concept essential to the efficacy of rights. Article 2 of the Covenant necessarily points to an object and purpose of the treaty that it be self-executing, that the nation-state's institutions provide effective domestic remedies, and that these be refined as needed. The Executive's non-self-execution policy, presently approved by the Senate, is unavoidably incompatible with such an object and purpose of the treaty.

Non-self-execution also would be inconsistent with the fundamental right of each person recognized in Article 14 "to a fair and public hearing by a competent, independent and impartial tribunal established by law" concerning "the determination of any criminal charge against him, or of his rights and obligations in a suit at law."11 Indeed, how can one have a "fair" hearing before a "competent" and "independent" tribunal concerning one's human rights if one does not have "a private cause of action" or a right to an effective remedy before such a tribunal? A similar inconsistency exits with respect to Article 9, paragraph 5, which guarantees that "the victim of unlawful arrest or detention shall have an enforceable right to compensation,"12 and Article 14, paragraph 6, which guarantees a related right to compensation "according to law" for those improperly convicted of a crime when there has been "a miscarriage of justice."13 Curiously, one of the U.S. "understandings" with respect to these treaty guarantees affirms that "the right to compensation referred to . . . require[s] the provision of effective and enforceable mechanisms by which a victim . . . may seek and, where

9. Id.
11. Id. art. 14, 999 U.N.T.S. at 176.
12. Id. art. 9, 999 U.N.T.S. at 176.
13. Id. art. 14, 999 U.N.T.S. at 177.
justified, obtain compensation,"14 an understanding that one can agree with but that is completely at odds with the non-self-execution policy.

Of additional import is Article 50 of the Covenant. It impliedly proclaims an object and purpose of the treaty to be self-operative, or self-extending when declaring: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."15 Clearly, a policy of non-self-execution would be in direct conflict with Article 50 and with the overall object and purpose of the treaty. What did the Bush Administration understand about Article 50? It did not understand that the Covenant would not be operative, but "that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction,"16 that "the Federal Government shall take measures appropriate to the Federal system,"17 and that its "intent is not to modify or limit U.S. undertakings under the Covenant."18 Nonetheless, its non-self-execution policy plays havoc with each of these assumptions.

Further, by stating that "existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated,"19 the Executive branch admits that there may be instances of noncompliance. Rather astoundingly, by admitting thereafter that no further implementing legislation is contemplated, the Bush Administration admitted that even if there are instances of noncompli-

14. See Senate Comm. on Foreign Relations, supra note 1, at 22, reprinted in 31 I.L.M. at 659 (emphasis added) (reviewing the United States' second understanding as to Articles 9(5) and 14(6) regarding compensation).
15. ICCPR, supra note 2, art. 50, 999 U.N.T.S. at 185.
16. See Senate Comm. on Foreign Relations, supra note 1, at 18, reprinted in 31 I.L.M. at 657 (emphasis added).
17. Id. (emphasis added).
18. Id. ("[T]he U.S. will implement its obligations under the Covenant by appropriate legislative, executive and judicial means . . . ." (emphasis added)); see also Thomas Buergenthal, International Human Rights 228 (1988) ("Missouri v. Holland, . . . indicates that the U.S. could constitutionally comply with Article 50 of the Covenant . . . ."); David Stewart, United States Ratification of the International Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1183, 1201 (1993) (asserting that there is no federalism reservation and if there had been, it would arguably violate Article 50).
19. See Senate Comm. on Foreign Relations, supra note 1, at 19, reprinted in 31 I.L.M. at 657 (emphasis added); see also id. at 10, reprinted in 31 I.L.M. at 653 ("In general, the substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution and laws, both state and federal. Consequently, the United States can accept the majority of the Covenant's obligations and undertakings without qualification."); infra note 26 (appraising the Covenant's compatibility with U.S. law).
ance, it did not contemplate acting in good faith to comply with paragraph 2 of Article 2, which requires that, "[w]here not already provided for by existing legislative or other measures," the United States undertake "necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Either existing U.S. law complies with the Covenant and no new legislative or other measures will be necessary, or existing law does not comply in full and other measures may be necessary, in which case action by the Executive should definitely be contemplated.

Moreover, by stating that human rights recognized in the Covenant, including the right to an effective remedy, are non-self-executing, the Executive branch in effect is seeking to impose blanket derogations from the above-mentioned obligations in a manner strikingly inconsistent with Article 4 of the Covenant. Article 4 allows derogations only "to the extent strictly required . . . [i]n time of public emergency which threatens the life of the nation," and then only when they "are not inconsistent with . . . other obligations under international law." In this case, not only is the Executive's attempted denial or limitation of the fundamental human right to an effective remedy not "strictly required" now or in the foreseeable future, but such a denial or limitation is also unavoidably inconsistent with customary international law and the human rights protected through the U.N. Charter. The same is true with respect to other human rights recognized in the Covenant. Thus, Ar-

20. For its failure to comply when legislation is reasonably and foreseeably needed, the United States should itself become responsible to private claimants denied justice or the human right to an effective remedy in domestic tribunals. Such a breach of an international obligation implicates a customary right of action either under customary prohibitions of denials of justice or customary human rights law. See Paut, supra note 5, at 611-28 (discussing customary rights to such remedies). For a discussion of the effect of such legislative clauses and the fact that they do not operate as inferences that the treaty is non-self-executing, see Paut, supra note 5, at 645 n.593, and Jordan J. Paut, Suit Saddam: Private Remedies for War Crimes and Hostage-Taking, 31 VA. J. INT'L L. 351, 366 & n.78 (1991). With respect to another treaty obligation contained in what has been found to be a non-self-executing treaty, a federal district court has recently stated that "[i]t is unconscionable that the United States should accede to" the treaty "and later claim that it is not bound by it." Haitian Centers Council, Inc. v. McNary, No. 92CI258, 1992 U.S. Dist. LEXIS 8452, at *5 (E.D.N.Y. June 5, 1992). The court also stated, "This court is astonished that the United States would do something "when it has contracted not to do so. The Government's conduct is particularly hypocritical . . . a cruel hoax . . . ." Id.; see Shelton, supra note 10, at 276 ("If the Senate is mistaken, then implementation either through legislation or judicial enforcement is required").

21. ICCPR, supra note 2, art. 4, 999 U.N.T.S. at 174.
22. See, e.g., supra note 6, infra note 59.
ticle 4 of the Covenant necessarily stands in opposition to a policy of non-self-execution. Further, the scheme of protection from derogations contained in Article 4 is so fundamental to the human rights treaty that a functional and blanket derogation by means of "non-self-execution" would necessarily be incompatible with the overall object and purpose of the treaty and should not be tolerated.23 Addi-

23. See infra note 38 (recognizing that domestic law is no excuse for failure to comply with international law). Addressing a 1983 Advisory Opinion of the Inter-American Court of Human Rights, Professor (Judge) Tom Buergenthal stated that the Opinion affirmed that nonderogability and incompatibility are linked and

that a reservation that sought to exclude totally the application of a right whose suspension is not permitted even in time of a serious national emergency would be incompatible with the object and purpose of the treaty. States would appear to be free, however, to make reservations to rights from which no derogation is permitted, provided the reservations do not weaken the right as a whole to a very substantial extent.

Thomas Buergenthal, The Advisory Practice of the Inter-American Human Rights Court, 79 Am. J. Int'l L. 1, 24-25 (1985) (addressing Advisory Opinion on Restriction to the Death Penalty, Inter-American Court on Human Rights, Adv. Op. No. OC-3 (1983) Ser. A, No. 3, reprinted in 23 I.L.M. 320 (1984)). He also adds: "The nexus between nonderogability and incompatibility derives from and adds force to the conceptual interrelationship which exists between certain fundamental human rights and emerging jus cogens norms." Id. at 25. The opinion stated that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.

Id. para. 61. Others have questioned the proper application of such a test and whether, in context, it was politically motivated. See LOUIS HENKIN ET AL., INTERNATIONAL LAW 430 (1987) (critiquing the Inter-American Court's opinion on the Guatemalan reservation). Moreover, the test seems to be partly flawed. It is inconsistent with paragraph 1 of Article 5 of the Covenant, which is similar to Article 29, paragraph (a) of the 1969 American Convention on Human Rights. The 1969 Convention affirms that no state can "suppress" or "restrict" them to a greater extent than is provided for herein" versus 1966 Covenant, article 5(1): no "destruction" or "limitation to a greater extent." American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (1970) (emphasis added); see BUERGENTHAL, supra note 18, at 36. The meaning of the word "derogation" includes detraction, impairment, limitation, degradation, and disparagement. See, e.g., 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 695 (1971) (defining "derogation"). Consequently, the prohibition of derogations must include a prohibition of "restrictions:" Further, the derogation clause in Article 29, paragraph 2, of the Universal Declaration of Human Rights uses the interchangeable word "limitations." G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 1, at 135, U.N. Doc. A/810 (1948). As such, it points to the obligations of signatories to the U.N. Charter and obligations under customary international law. See also Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (declaring that the prohibition against torture is "guaranteed to all by the Charter" and has become part of customary international law "as evidenced and defined by the Universal Declaration"); infra notes 58-64 and accompanying text (demonstrating the incompatibility of a non-self-execution policy with U.S. obligations under the U.N. Charter to respect and observe human rights).
tionally, it is quite obvious that a policy of non-self-execution would be fundamentally opposed to the object and purpose of paragraph 1 of Article 5, which assures:

Nothing in the present Covenant may be interpreted as implying for any State . . . any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.24

A policy of non-self-execution, as a valid part of the Covenant’s matrix for the United States, would carve out for the United States a right to engage in such prohibited activity, and this simply must not be allowed.

When the Executive declared that it is the view of the United States that signatories “should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant,”25 it also set up an illogical clash between such a rights-enhancing policy and its profoundly disruptive policy of non-self-execution. If actually operative, such a confused Executive policy could also appear to be hypocritical if we demand of others that they refrain from imposing “any restrictions or limitations on the exercise” of rights that are not thought to be exercisable in the United States. What may also appear to be hypocritical is President Bush’s statement that “[t]he Covenant codifies the essential freedoms people must enjoy in a democratic society,”26 although application of the non-self-execution policy would actually deny direct enjoyment of such essential freedoms and may have the effect of denying some altogether.

Of additional import is the warning from the Lawyers Committee for Human Rights in 1991 that a declaration of non-self-execution is not only “constitutionally unnecessary,” but also undesirable because it “would undermine one of the principal reasons why the Constitution made treaties the law of the land and gave the Presi-

24. ICCPR, supra note 2, art. 5, 999 U.N.T.S. at 174.
25. See Senate Comm. on Foreign Relations, supra note 1, at 19, reprinted in 31 I.L.M. at 657.
dent and the Senate the power to make such treaties."27 A recent report of the Human Rights Committee of the American Branch of the International Law Association also stated that "[t]he question of whether a treaty is sufficiently precise to be directly enforced in the courts is a doctrine initially developed by the judiciary, and it would be more appropriate for such a decision to be left with the judicial branch,"28 adding that it "may well be that a non-self-executing declaration . . . does not bind the judicial branch."29 The report also declared:

[A] blanket attempt to prevent United States citizens (and others) from invoking provisions of the Covenant in United States courts is both unnecessary and unwise. Where Covenant provisions are too vague to be implemented or where they clearly contemplate discretionary subsequent action, a court may decline to find that they provide a cause of action. On the other hand, where a Covenant provision is direct and sufficiently precisely formulated, it would be a serious interference with meaningful implementation of the Covenant to deprive a United States resident of the right to assert his or her rights under the Covenant in a United States court.30

"Domestically," the report notes, "such an approach is also contrary to the test [concerning self-executing status] developed by the United States Supreme Court"31 in two landmark cases, since the Covenant certainly (a) prescribes rules by which rights may be determined, and (b) such rights are protected by the treaty — factors

27. Michael Posner, Executive Director, Lawyers Committee for Human Rights, Testimony Before the Committee on Foreign Relations, United States Senate (Nov. 21, 1991); see also Letter from Michael Posner, Executive Director, Lawyers Committee for Human Rights, to Senator Claiborne Pell, Chair, Senate Foreign Relations Committee (Dec. 10, 1991) (copy on file with DePaul Law Review).


29. Report of the Committee on Human Rights, supra note 28, at 111 n.26; see also infra note 40 and accompanying text (arguing that the non-self-execution declaration is not part of the treaty).

30. Report of the Committee on Human Rights, supra note 28, at 111-12; see also Damrosch, supra note 28, at 516, 518, 531.

or circumstances which, "'whenever' " they exist, are to assure self-executing status.32

These views are generally shared by other legal scholars familiar with human rights law. Addressing a related Executive policy which arose in 1978, Professor Louis Henkin wisely affirmed that an Executive policy of not agreeing to any change in U.S. law through the treaty would be "ignoble," "outrageous," and actually "fraudulent," for "[w]hat sort of convention would you have if every country ad\nhered subject to the reservation that it would not make any changes in its laws?"33 Similarly, Professor Oscar Schachter had declared that such a policy would be "seriously deficient and mistaken," since it "is contrary to the basic object of the covenant, which is clearly to have the parties adapt their domestic law as necessary to meet the obligations of the covenant."34 He rightly added that Article 2 of the Covenant, in contradistinction to such an Executive policy, actually "requires the states to provide effective remedies to individuals, and in general terms it mandates that full effect be given to each of the recognized rights."35 Professor David Weissbrodt has added that the effects of a non-self-execution policy, if implemented, would be "to deprive American courts of their most potent technique for contributing meaningfully to the interpretation of the Human Rights


34. International Human Rights Treaties: Hearings Before the Senate Committee on Foreign Relations, 96th Cong., 2d Sess. 85, 87 (1979) (statement of Oscar Schachter), reprinted in Richard E. Lillich, INTERNATIONAL HUMAN RIGHTS 220, 221 (2d ed. 1991); Shelton, supra note 10, at 275; see also Oscar Schachter, The Obligations of the Parties Give Effect to the Covenant on Civil and Political Rights, 73 AM. J. INT'L L. 462, 465 (1979) ("There can be no doubt that the object of Article 2 was to require all parties to adopt measures wherever necessary to give effect to the Covenant.").

35. International Human Rights Treaties, supra note 34, at 86, reprinted in Lillich, at 221; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. c (1987) ("Failure to provide such remedies would constitute an additional violation of the agreement.") (hereinafter RESTATEMENT); id. § 711 cmt. a (stating that the "denial of justice" includes a "denial of access to courts"); id. § 711 cmt. c ("[C]ustomary law includes ... rights articulated in the principal international human rights instruments — the Universal Declaration and the International Covenant on Civil and Political Rights — as rights of human beings generally ... "); John Quigley, The International Covenant on Civil and Political Rights and the Supremacy Clause, 42 DePaul L. Rev. 1287, 1300-02 (1993).
Covenants . . . [and] to diminish substantially the impact of the treaties in the United States." \(^{96}\) "Because much of the language in the Covenants denotes self-execution, and because self-execution provides an effective means of enforcement," Weissbrodt has noted, "it is improper for the United States to assert a declaration that categorically denies that effect." \(^{97}\) Indeed, Professor Weissbrodt and Professor Frank Newman remark, "The use of extensive limitations to minimize the effect of a treaty on domestic practices of parties may contravene established principles of international law" which recognize, for example, that provisions of domestic law are no excuse with respect to a state's failure adequately to implement treaty obligations. \(^{98}\)

It is also interesting to note that despite an apparent effort to gut the treaty of any direct effect in U.S. domestic legal processes, the Executive position more generally with respect to a "declaration" or "statement" has been that such terms "are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty." \(^{99}\) Clearly,

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36. David Weissbrodt, United States Ratification of the Human Rights Covenants, 63 MINN. L. REV. 35, 67-68 (1978), reprinted in FRANK C. NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 590, 591 (1990); see also Damrosch, supra note 28, at 518, 532 (arguing that the Covenant could cause U.S. courts to lose the opportunity to influence the interpretation and clarification of the treaty globally and would leave this opportunity to foreign institutions).

37. Weissbrodt, supra note 36, at 35, 67-68; see also Burns H. Weston, U.S. Ratification of the International Covenant on Economic, Social and Cultural Rights: With or Without Qualifications, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES, supra note 33, at 27, 37-38 (criticizing the non-self-execution policy of the Carter Administration); but see Arthur Rovine, Remarks, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES, supra note 33, at 70 (arguing that the treaty must be implemented by legislation, is non-self-executing).

38. See Newman & Weissbrodt, supra note 36, at 589-90; see also MYRES S. McDougAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 352, 361 (1980) (adding that the Covenants "do not provide for denunciation; the commitments undertaken under the Covenants are so fundamental and intensely demanded that they are not expected to be altered, certainly not by unilateral action"); Stefan A. Riesenfeld & Frederick M. Abbott, The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties, 67 CHI.-KENT L. REV. 571, 624, 630 (1991) (adding: "Reservations which purport to assert the supremacy of internal U.S. law are inconsistent with the object and purpose of the . . . [Genocide Convention] and should be invalid as a matter of both international and municipal law."); Schachter, supra note 34, at 465 (claiming it "turns upside down" such a rule).

the Executive's non-self-execution policy, if allowed, would have the effect of derogating from several substantive rights and obligations set forth above. Consequently, a "non-self-execution" declaration, at least with respect to human rights treaties, is a non sequitur as a matter of Executive policy.

More importantly, Professor Richard Lillich asks rhetorically: "Could U.S. courts not ignore such a declaration, since it is not a part of the treaty and hence the supreme law of the land?" a point picked up in the International Law Association's committee report. Indeed, because of its unavoidable and fundamental inconsistency with several rights and obligations stipulated in the treaty as well as the overall object and purpose of the treaty, should not our courts also declare that this illogical policy lacks any legal relevance? Under customary international law, which is also supreme law of the land, whether or not the "declaration" was an at-

40. Richard E. Lillich, International Human Rights 229 (2d ed. 1981); see Quigley, supra note 35, at 1301; Riesenfeld & Abbott, supra note 38, at 608; Riesenfeld & Abbott, supra note 39, at 296; Shelton, supra note 10, at 276 ("It is not binding on the courts . . . and does not involve international obligations within the exclusive competence of the legislative and executive branches."); Charles H. Dearborn III, Note, The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing, 57 Tex. L. Rev. 233, 245, 250-51 (1979) (contending that such a declaration may not be part of the treaty and may not bind courts); cf. Iwasawa, supra note 4, at 670 & nn.200, 202 (arguing that a prior draft declaration, in context, would not have been a reservation because such a draft, in context, was "not intended to change the obligations of the United States under international law," but that such a draft declaration could still "bind the courts" as a "condition" to the Senate's "consent").


42. See generally Restatement, supra note 35, $ 111 cmts. d & e, reporters' note 4; id. $ 702 cmt. c; Jordan J. Paust, Customary International Law: Its Nature, Sources and Status as Law of the United States, 12 Mich. J. Int'l L. 59 (1990) (discussing the origins of customary international law and its role as U.S. law). Under the Constitution, such law is also binding on the president. See Jordan J. Paust, The President Is Bound by International Law, 81 Am. J. Int'l L. 377 (1987) (analyzing the constitutionally-based duties of the president and relevant judicial opinions); Jordan J. Paust, Correspondence, 87 Am. J. Int'l L. 252 (1993); cf. Michael Glennon, State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain, 86 Am. J. Int'l L. 746, 751 (1992) (stating that a "presidential violation of those norms is unconstitutional" when Congress is silent); Malvina Halberstam, A Treaty Is a Treaty Is a Treaty, 33 Va. J. Int'l L. 51, 66 (1992) (stating that "the President is required to give effect to U.S. obligations under international law, which, of course, includes treaty obligations," and thus, of course, customary international law); Louis Henkin, Correspondence, 87 Am. J. Int'l L. 100, 101-02 (1993) ("[T]he executive branch is no more free under the Constitution to violate customary law than it is to violate a treaty . . . . In general, it is the President's duty to take care that the law be faithfully executed, and that includes treaties of the United States as well as customary international law as law of the United States," but arguing that the president "may" have "some independent constitutional authority to take some actions in foreign affairs in which he has independent constitutional autonomy even if his action is inconsistent with international law." (emphasis added)); see also Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 261 (1984) (stating that, although political branches may terminate a treaty, power "delegated by Congress to the Executive
tempted "reservation" to the treaty it appears to so operate, and a reservation "incompatible with the object and purpose of the treaty" cannot lawfully be formulated or take effect. Thus, the declaration appears to be void ab initio as a matter of law. This quite apt and certain result in the case of incompatible "reservations" is all the more appropriate with respect to an extraordinary multilateral treaty (a fundamental human rights treaty with more than one hundred signatories) formed and operative long before the United States decided to become a signatory. Clearly, non-self-execution of such a human rights treaty would be so fundamentally incompatible

Branch" must not "be exercised inconsistent with . . . international law"); United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 533 (1841) (victorious argument of counsel for individual claimants that the "federal executive" does not have "the power of making our nation accesso-

See generally Vienna Convention on the Law of Treaties, art. 2(1)(d), opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (using language that, "'Reservation' means a unilateral statement . . . however phrased or named, . . . whereby it purports to exclude or to modify . . . "); RESTATEMENT, supra note 35, § 313 cmt. g ("Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation."); Richard W. Edwards Jr., Reservations to Treaties, 10 Mich. J. Int'l L. 362, 367-73 (1989); Michael J. Glennon, The Constitutional Power of the United States Senate to Condition Its Consent to Treaties, 67 Chi.-Kent L. Rev. 533, 539, 541-43 (1991); Riesenfeld & Abbott, supra note 38, at 586, 588, 621, 631; cf. Iwasawa, supra note 4, at 670 n.200. If it were to operate as a "reservation," but was not so intended, it may well be that it is severable at the international level (i.e., that the mere "declaration" did not actually and unalterably condition U.S. consent to ratification). If so, the predictable voiding of the intended "declaration" will not operate to vitiate U.S. ratification of the treaty. This I assume will be the result in this instance. Indeed, one should recognize a presumption that mere "declarations" do not unalterably condition consent to ratification. See New York Indians v. United States, 170 U.S. 1, 22-23 (1898) (holding that Senate's "proviso," though legally inoperative, did not void the treaty — thus, the inoperative proviso was, in effect, severable); Edwards, supra, at 373-78 (discussing whether a state can be held to have consented to a treaty when a reservation has been ruled invalid); Riesenfeld & Abbott, supra note 38, at 588-89, 597-98 (analyzing severability); Luzius Wildhaber, Parliamentary Participation in Treaty-Making, Report on Swiss Law, 67 Chi.-Kent L. Rev. 437, 454-57 (1991).

with the object and purpose of the treaty that it must not be allowed. Clearly also, if such a "reservation" to the treaty will be void \textit{ab initio}, an attempted "declaration" of the same nature must also be void and of no legal effect.46

Additionally, there are significant powers of the judiciary at stake and an attempted "declaration" cannot rewrite the Constitution or deprive the judiciary of its constitutional authority. In this case, not only does the federal judiciary have the ultimate authority to identify, clarify, and apply treaties in cases properly before the courts,46 but it has the same general authority and responsibility with respect to customary international law.47 Moreover, such judicial authority is especially compelling with respect to the protection of fundamental human rights.48 Indeed, as recognized by Chief Justice Marshall,

45. \textit{See} Riesenfeld \& Abbott, \textit{supra} note 38, at 608, 631-32, 641, 643 (questioning also the constitutional basis and effect of the Senate's conditional "declarations" and concluding that the Senate "does not have an ancillary constitutional power to enact domestic legislation under the guise of the treaty power").

46. \textit{E.g.}, Nielson v. Johnson, 279 U.S. 47, 51-52 (1929) (discussing judicial power to interpret treaties, also identifying and applying judicially constructed rules of treaty interpretation); Jordan v. Tashiro, 278 U.S. 123, 126-27 (1928) (same); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (same, adding: "[The treaty] operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239-40, 249, 251, 253-54, 283 (1796) (stating that the Court is not bound by private opinions of negotiators); \textit{see} Jordan J. Paust, \textit{Self-Executing Treaties}, 82 \textit{AM. J. INT'L L.} 760, 761-66, 772-73, 776-77, 782 (1988) (discussing judicial powers); Riesenfeld \& Abbott, \textit{supra} note 38, at 582-84, 609, 632 (concluding that while the Executive and Senate statement of intent should be given great weight by courts, "great weight does not demand blind obedience," and the courts are the final authority for interpretation).

47. \textit{See, e.g.}, Paust, \textit{Customary International Law}, \textit{supra} note 42. \textit{See generally} Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (citing \textit{The Paquete Habana}, 175 U.S. 667, 712 (1900)); Jordan J. Paust, \textit{Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom}, 28 \textit{VA. J. INT'L L.} 393, 394 n.1, 418-43 (1988). Constitutionally, such authority derives most directly from Article III, Section 1 ("The Judicial Power") and Section 2, Clause 1 ("all Cases . . . arising under . . . the Laws of the United States," since customary international law is part of the laws of the United States), and Article VI, Clause 2. \textit{See also} Henfield's Case, 11 F. Cas. 1099, 1100-01 (C.C.D. Pa. 1793) (No. 6,360) ("[L]aws of the United States [include] . . . [t]he laws of nations"); \textit{RESTATEMENT}, \textit{supra} note 35, § 111 reporters' note 4; Paust, \textit{supra}, at 394 n.1, 420 n.55 (demonstrating that the judicial competence to "identify, clarify and apply international law [is] constitutionally based"). Congress's power is only concurrent to that of the judiciary, and it is expressed merely as a power to "define" and to "punish." \textit{See, e.g.}, Paust, \textit{supra}, at 420 n.55. Congress may "define and punish" offenses against the law of nations, but may not make laws which explicitly abrogate international norms. \textit{Id.} The judiciary has the power, at least in civil matters, to directly incorporate customary international law. \textit{Id.} at 437 & n.90 (stating that customary international law has historically been "self-executing"). With respect to criminal sanctions, see Paust, \textit{supra} note 44, at 103 (suggesting that the prohibition of genocide is directly enforceable by U.S. courts even without domestic legislation).

48. \textit{See, e.g.}, Paust, \textit{supra} note 5, at 609, 611-28 (reviewing the historical enforcement of
our federal courts "are established . . . to decide on human rights." Thus, if the policy disclosed in the declaration is not changed, the judiciary, applying customary international law and the analysis above, should conclude that such a policy is recognizably void and, thus, not legally operative. An independent judiciary could thereby assure more adequately the basic human right to an effective remedy protected under customary international law, the U.N. Charter, the Covenant, and, as explained below, several amendments to the U.S. Constitution.

Importantly, Professor Lori Fisler Damrosch affirms that such a declaration "is constitutionally questionable as a derogation from the ordinary application of Article VI of the Constitution . . . ." Recognizing that such a declaration smacks of a violation of the separation of powers, she aptly adds:

Article III of the Constitution establishes federal judicial jurisdiction over treaty-based cases, yet the non-self-executing declaration purports to tell courts not to apply a treaty in cases that could otherwise properly come before them. This deviation from the normal mode of treaty implementation cannot be justified in view of the respective roles of the Senate and the judiciary concerning treaties. The Framers explicitly contemplated judicial enforcement of treaties; they did not envision any role for the Senate in treaty implementation, beyond giving advice and consent to ratification, and they certainly did not expect the Senate to stand in the way of the courts' discharge of a constitutionally-established function.

Additionally, she warns that a policy of non-self-execution could play havoc with a proper balance and separation of powers between the executive and the judiciary, since its operation would impermissibly "remove the courts as a potential check on executive actions contrary to the treaty." This, of course, should not occur in view of express judicial powers at stake and the express constitutional duty of the president, which neither he nor the Senate may rewrite, to faithfully execute the law.

Professors Stefan Riesenfeld and Fred Abbott have also added their opposition to Senate attempts "to deprive treaties of their self-

human rights precepts by the courts and judicial power and responsibility to develop remedies for their breach.

49. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810).
50. Damrosch, supra note 28, at 527.
51. Id. at 531; see also supra note 46 (discussing judicial power and treaty interpretation).
52. Damrosch, supra note 28, at 528.
53. U.S. Const. art. III, §§ 1 and 2, cl. 1; see U.S. Const. art. VI, cl. 2; supra note 46.
54. See supra note 42.
executing character and thereby deprive individuals of private rights of action under them."\textsuperscript{55} With respect to a proper separation of powers, they rightly note: "The framers of the Constitution intended that treaties be given direct effect in U.S. law when by their terms and context they are self-executing. An ancillary power of the Senate to deny self-execution directly contradicts this intent."\textsuperscript{56} Elaborating on their general theme, they write:

We believe that the Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts. The Senate has the unicameral power only to consent to the ratification of treaties, not to pass domestic legislation. A declaration is not part of a treaty in the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. United States courts are bound by the Constitution to apply treaties as the law of the land. They are not bound to apply expressions of opinion adopted by the Senate (and concurred in by the president). The courts must undertake their own examination of the terms and context of each provision in a treaty to which the United States is a party and decide whether it is self-executing. The treaty is law. The Senate's declaration is not law. The Senate does not have the power to make law outside the treaty instrument.\textsuperscript{57}

Of further significance is the incompatibility of a non-self-execution policy with U.S. obligations under the U.N. Charter.\textsuperscript{58} As the preamble to the Covenant recognizes, states have an obligation "under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms."\textsuperscript{59} If non-

\textsuperscript{55} Riesenfeld & Abbott, supra note 38, at 599, passim.
\textsuperscript{56} Id. at 599; see also supra note 46.
\textsuperscript{57} Riesenfeld & Abbott, supra note 39, at 296-97. But see Glennon, supra note 43, at 536-39 (noting that Senate conditions in a given case could become part of the treaty and thus treaty law). Professor Glennon adds, however, that Senate conditions certainly cannot violate the separation of powers nor, presumably, the Bill of Rights any more than the treaty to which they might attach. See id. at 538, 566 (adding, more generally, "not . . . without constitutional limits"). On this point, see also Restatement, supra note 35, § 303 reporters' note 4 (supporting the proposition that a Senate condition involving the president's constitutional powers would be ineffective); id. § 111 cmt. a ("[P]rovisions of international agreements . . . are subject to the Bill of Rights and . . . the Constitution, and cannot be given effect in violation of them."); Riesenfeld & Abbott, supra note 38, at 591 (citing Louis Henkin, Treaties in a Constitutional Democracy, 10 Mich. J. Int'l L. 406, 417 (1989)) (suggesting inherent limits on the Senate's power to attach reservations or other conditions to its consent); infra note 93.
\textsuperscript{58} June 26, 1945, 59 Stat. 1031, T.S. No. 993.
self-execution were allowed as a matter of U.S. policy, it would be impossible to conclude that the United States policy was consistent with such an obligation to respect and to observe human rights universally and thus within the United States. Since the preamble to a treaty is a legally relevant and useful part of the treaty, one can recognize that there has been an indirect incorporation of U.N. Charter obligations through the Covenant's preamble into the matrix of Covenant objectives, purposes, and obligations. Article 46 of the Covenant provides another useful reference to the U.N. Charter and, in any event, Article 103 of the Charter itself assures that U.N. Charter obligations to respect and to observe human rights, including the customary right to an effective remedy, will take precedence as a matter of law. Because these obligations prevail in any event, they should also be read into and condition a permissible interpretation or application of the Covenant. They are a necessary background to the Covenant even without preambular incorporation. These general points are all the more important with respect

60. See, e.g., Vienna Convention on the Law of Treaties, supra note 43, art. 31(2), 8 I.L.M. at 692 ("The context for the purpose of the interpretation of a treaty shall . . . includ[e] its Preamble . . . .").
61. Article 46 reads in pertinent part: "Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations" with respect to U.N. organ and agency responsibilities. ICCPR, supra note 2, art. 46, 999 U.N.T.S. at 184-85.
62. Article 103 of the U.N. Charter reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.
63. See also Vienna Convention on the Law of Treaties, supra note 43, art. 31(3)(c), 8 I.L.M. at 692, which requires the use, while interpreting a treaty, of "[a]ny relevant rules of international law applicable . . . ," and, thus, relevant treaty-based or customary international law. Since the beginning of our country, the U.S. Supreme Court has normally followed this quite rational and policy-serving approach. See, e.g., United States v. Alvarez-Machain, 112 S. Ct. 2188, 2201-03 & n.27 (1992) (Stevens, J., dissenting) (finding also that the forcible kidnapping of a Mexican national "unquestionably constitutes a flagrant violation of international law"); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-21 & n.12 (1963) (stating that an act of Congress is interpreted partly with reference to treaty and each is interpreted partly with reference "to the well-established rule of international law that the law of the flag state ordinarily governs the international affairs of a ship"); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (interpreting a treaty's terms according to their ordinary meaning "as understood in the public law of nations"); Geofroy v. Riggs, 133 U.S. 258, 271 (1890) (same); United States v. Rauscher, 119 U.S. 407, 419-20, 429 (1886) (interpreting a treaty with reference to customary international law); The Pizarro, 15 U.S. (2 Wheat.) 227, 246 (1817) ("[T]he law of nations . . . is always to be consulted in the interpretation of treaties . . . ."); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 261 (1796) (Iredell, J., dissenting) ("The subject of treaties . . . . is to be determined by the law of nations"); see also Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 259, 261 (1984) (recognizing that a Congress and Executive branch "arrangement" must be exercised consistently with "international law" and construing the Warsaw Convention "in light of its purposes, the
to certain rights reflected in the Covenant which have now become not merely customary international law (which are also protected through the U.N. Charter), but also peremptory norms as *jus cogens*. As Articles 53 and 64 of the Vienna Convention on the Law of Treaties affirm, a treaty is void if it conflicts with an extant or newly emerged peremptory norm of international law (*jus cogens*). Clearly if a conflicting treaty is thereby void, an attempted "reservation" or "declaration" which conflicts with a *jus cogens* norm must also be void, and such is the case in this instance.

The fact that certain rights reflected in the Covenant are customary is quite significant for another reason. As customary human rights, they are directly incorporable as supreme federal law regardless of the status of the particular treaty in which they are reflected, i.e., whether or not the treaty is self-executing or has even been ratified by the United States. Thus, even if it were not legally absurd to conclude that the Covenant is non-self-executing, the self-executing treaty doctrine does not apply to customary international law and therefore poses no obstacle to the direct incorporation of customary human rights norms for use in domestic litigation. In fact, before the United States had even ratified the Covenant, the treaty had already been used in various federal court opinions to help iden-
tify and clarify several customary human rights that can be directly incorporable. In the landmark opinion in *Filartiga v. Pena-Irala*, the Second Circuit used the Covenant as one of several human rights documents reflecting the customary prohibition of torture. The Covenant was also used in the Second Circuit in *United States v. Romano* to exemplify due process guarantees for those charged with a crime under the customary "denial of justice" standard.

The Ninth Circuit, in *Lipscomb ex rel. DeFehr v. Simmons*, affirmed that "[t]he constitutional right to associate with family members . . . is so fundamental that it has been recognized in . . . [among other instruments,] the International Covenant . . . ." More generally, the Fourth Circuit recognized that "[d]ocuments detailing minimum standards of human rights . . . include . . . the International Covenant . . . ." In *Fernandez v. Wilkinson*, an appellate court recognized the Covenant as a principal source of "fundamental human rights," including the customary prohibition of arbitrary detention, and that even though the United States was not bound by the treaty, it is "indicative of the customs and usages of civilized nations" which federal courts are bound to apply.

And in *Forti v. Suarez-Mason*, another appellate court used the Covenant as an aid in the identification and clarification of customary prohibitions of summary execution and the international "tort of 'causing disappearance.'" The Covenant was also used by a federal district court in California to demonstrate that "[o]ne of the essential requirements of fairness in international law is that persons may not be subjected to laws that make criminal, actions which were innocent at the time" they were committed.

The growth of customary law will assure that other rights reflected in the Covenant are also directly incorporable. For example,

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67. 630 F.2d 876 (2d Cir. 1980).
68. Id. at 883-84; see also Siderman, 965 F.2d at 716-17 & n.15 (relying upon the Covenant in holding that the prohibition against official torture has attained *jus cogens* status).
69. 706 F.2d 370 (2d Cir. 1983).
70. Id. at 375 & n.1.
71. 884 F.2d 1242 (9th Cir. 1989).
72. Id. at 1244 & n.1.
73. M.A. A26851062 v. U.S. INS, 858 F.2d 210, 219 n.7 (4th Cir. 1988).
75. Id. at 797.
76. Id. at 798-800.
78. Id. at 710.
by 1987, the Restatement (Third) of Foreign Relations Law of the United States had already catalogued the following human rights prohibitions, most of which are reflected in the Covenant:

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.80

The customary prohibition of "gross violations" is potentially broad,81 and the Restatement also notes that its list is not exhaustive.82 Also of interest is the fact that the Restatement used the Covenant as one of several relevant treaties exemplifying "internationally recognized" and customary human rights.83 Additionally, the Executive had already recognized that certain human rights reflected in the Covenant are customary, that corresponding legal duties of governments are owed to those within their own territory, and that such customary rights are directly enforceable in domestic courts.84

Whether or not a particular treaty or treaty-based right is self-executing, or even customary international law, treaty norms can also be used indirectly as aids for clarifying or interpreting rights contained in the U.S. Constitution, customary international law, federal statutes, state law, or even common law.85 Indeed, through-

80. Restatement, supra note 35, § 702. Prohibitions (a) through (f) are also considered to be jus cogens. See id. § 702 cmt. n.
81. See id. § 702 cmt. m.
82. Id. §702 cmts. a, k, l. The Restatement also quotes section 116(a) of the Foreign Assistance Act, 22 U.S.C. § 2151n(a) (1988), which adds: "flagrant denial of the right to life, liberty, and the security of person . . . ." Restatement, supra note 35, reporters' note 10.
83. Restatement, supra note 35, § 702 cmts. b, f, h, l, m, reporters' notes 2, 5, 6, 8, 10, 11.
84. See, e.g., Paust, supra note 59, at 236-37 (citing examples where the United States has used human rights treaties as "indicia of law" even without the Senate's advice and consent for ratification); Paust, supra note 5, at 644 (reviewing instances where the United States has used human rights treaties not yet brought before the Senate).
85. See, e.g., Paust, supra note 59, at 240-42, 244; Paust, supra note 46, at 781-82; Shelton, supra note 10, at 277; see also Damrosch, supra note 28, at 532 (adding, "Nothing in a non-self-executing declaration necessarily . . . prevent[s] internationally-minded jurists from applying other sources of law . . . in a manner that will promote the objectives of international treaties"); Yuji Iwasawa et al., Remarks, 80 Proc., Am. Soc. Int'l L. 425-26 (1986) (discussing the domes-
out our history, human rights norms have most often been used in this manner, and several federal judges have used the Covenant indirectly as an interpretive aid even before the treaty was ratified by the United States. Thus, the Covenant can continue to affect the Constitution and other laws of the United States indirectly as an interpretive aid, and it is likely that with U.S. ratification of the treaty, this role, if anything, will expand. For these reasons, one of the formal U.S. reservations to the treaty, "[t]hat the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United

tic applicability and effects of human rights treaties that are deemed non-self-executing). Importantly also, since the Supremacy Clause assures that "all treaties" are supreme law of the land, U.S. CONST. art. VI, cl. 2 (emphasis added), and in no Supreme Court decision has the supremacy of treaties over state law had to hinge upon the status of a treaty as "self-executing," see Paust, supra note 47, at 431-33 n.79, the far better view is that even a non-self-executing treaty preempts inconsistent state law. On this general point, see Senate Comm. on Foreign Relations, supra note 1, at 17-18, reprinted in 31 I.L.M. at 656-57, which states that "the Covenant will apply to state and local authorities . . . " (emphasis added).

86. See Paust, supra note 5, at 593-96, passim. Human rights norms have been used especially in connection with constitutional rights. See id. at 571-610. Additionally, there has been a use of human right precepts in more than 140 Supreme Court opinions and in more than 1,000 lower federal court opinions. See id. at 545, 593-95, passim.

87. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 390 & n.10 (1989) (Brennan, J., dissenting) (noting that the Covenant as well as two other human rights treaties signed by the United States "explicitly prohibit juvenile death penalties"); Thompson v. Oklahoma, 487 U.S. 815, 831 n.34 (1988) (stating that the Covenant and other human rights instruments "explicitly prohibit juvenile death penalties"); Burger v. Kemp, 483 U.S. 776, 824 n.5 (1987) (Powell, J., dissenting) (asserting that the Covenant reflects international opinion against imposing the death penalty on juveniles); Hinkie v. United States, 715 F.2d 96, 98 n.3 (3d Cir. 1983) (considering a complaint alleging "conduct which would violate the . . . International Covenant," and affirming: "The international consensus against involuntary human experimentation is clear. A fortiori the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt.") (quoting Jaffee v. United States, 663 F.2d 1226, 1249-50 (3d Cir. 1981)); Filartiga v. Pena-Irala, 630 F.2d 876, 881-84 (2d Cir. 1980) (relying on the Covenant and several other international instruments prohibiting torture); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388, 1390 (10th Cir. 1981) (incorporating human rights protections without specifically citing the Covenant, although it had been used by the lower court); Von Dardel v. U.S.S.R., 623 F. Supp. 246, 261 (D.D.C. 1985) (deciding that treatment violated a number of human rights treaties, including the Covenant); Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 n.18 (N.D. Ga. 1981) (stating that the defendant's incarceration constituted a violation of the Covenant); Lareau v. Manson, 507 F. Supp. 1177, 1193 n.18 (D. Conn. 1980) (referring to the Covenant as an indication of international norms and U.S. standards of decency); Paust, supra note 59, at 240-42 (analyzing the use of the Covenant by federal courts to interpret the Constitution and various statutes); see also Newman, supra note 3, at 1255 (predicting that there will be an impact on U.S. law even assuming the validity of all the reservations, declarations, and understandings).
States," should not require a particular reading of those amendments. Additionally, our reading of those amendments can certainly change through time and, as noted above, can be conditioned by international law, including the Covenant. These same general points apply with respect to two other U.S. reservations, to an understanding, and to a proviso not "included in the instrument of ratification," which refer to protections, constraints, guarantees, and prohibitions under the U.S. Constitution. To the extent that the Covenant is used by the judiciary to supplement or condition the meaning of our Constitution, such provisions will become nearly meaningless at the domestic level.

More importantly, an executive policy of "non-self-execution" resulting in the non-execution of basic human rights would seem to be unavoidably unconstitutional in character and effect. First, implementation of a blanket non-execution policy would necessarily be unconstitutional. Depending upon the particular right(s) at stake in a given circumstance, one or more of several relevant amendments to the U.S. Constitution can be implicated. Clearly, such amendments to the Constitution place limits on executive power, including

88. Senate Comm. on Foreign Relations, supra note 1, at 22, reprinted in 31 I.L.M. at 659 (reservation no. 3).
89. See id. (reservation nos. 1 & 2). Reservation number 1 concerning the Covenant assures "[t]hat Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States," yet such a reservation requires no particular reading of the First Amendment. Id.; see also Jordan J. Paust, Rereading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility, 43 Rutgers L. Rev. 565, 568-69, passim (1991) (noting that no particular reading of the First Amendment is required by such a reservation with respect to treaties prohibiting racial discrimination).
90. See Senate Comm. on Foreign Relations, supra note 1, at 22, reprinted in 31 I.L.M. at 659 (citing U.S. understanding no. 1).
91. Id. at 24, reprinted in 31 I.L.M. at 660. The proviso reads:
   Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.
   Id.; see also Riesenfeld & Abbott, supra note 38, at 628-29 (discussing the effects of such a proviso).
92. See generally Paust, supra note 89, at 567-69, 572-73 (explaining the possible effect of a reservation to another treaty with reference to constitutional rights of free speech); see also Burgenthal, supra note 18, at 228; Henkin, supra note 33, at 21, 25 (reprinted in Lillich, supra note 40, at 217) ("In principle, there are no constitutional objections. The treaty makers can adhere to the human rights covenants. There are no constitutional objections based on federalism or the separation of powers or on some notion that the subject is not of international concern."); Rovine, supra note 37, at 61 (submitting that the "federal-state clause will not have much impact").
those powers exercised in conjunction with the treaty power or the "foreign affairs" power. They limit the power of the president and other executive officials to do or refrain from doing certain acts, and non-execution of a relevant constitutionally-based or constitutionally-mirrored right can violate a particular amendment or set of amendments to the Constitution. It was not openly the policy of the Bush Administration to violate the Constitution, but non-execution of certain human rights can certainly involve infractions of the Constitution. We must assume, therefore, that the Executive will not attempt to engage in (and the courts will not allow) activity violative of human rights which are also based or mirrored in, say, the First, Fourth, Fifth, Sixth, or Eighth Amendments to the Constitution. Such rights are (in a sense), and must be, "executed" to the extent that the amendments also guarantee their efficacy. Thus, a blanket "non-self-execution" policy, operative as a non-execution policy, must not have been actually intended by the president (or the Senate). If it had been, it would have been unavoidably unconstitutional. It follows that the Executive knew or should have known that various human rights documented in the Covenant are already operative or executable (if not "self"-executing) through several amendments to the Constitution.

Second, implementation of a blanket non-execution policy would most certainly involve a denial or disparagement of the human rights protected by the Ninth Amendment to the Constitution. The Ninth Amendment was meant to assure the continued efficacy of

93. See, e.g., Reid v. Covert, 354 U.S. 1, 16-17 (1957) (holding that treaties must comply with the Constitution); Paust, supra note 47, at 393 (citing cases asserting the supremacy of the Constitution). Thus, human rights protected by or under the Constitution cannot be denied or disparaged through use of the treaty power, but treaties can aid in the clarification and enhancement of those rights and guarantees. See also Philip R. Trimble & Jack S. Weiss, The Role of the President, the Senate and Congress With Respect to Arms Control Treaties Concluded by the United States, 67 Chi.-Kent L. Rev. 645, 649 (1991) ("A Senate-imposed condition . . . may not infringe other provisions of the Constitution, such as the Bill of Rights . . . ."); supra note 57.

94. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (affirming that the president's power over international affairs is subordinate to the Constitution); Louis Henkin, Foreign Affairs and the Constitution 253, passim (1972) (same).

95. See Senate Comm. on Foreign Relations, supra note 1, at 10, reprinted in 31 I.L.M. at 653 ("In general, the substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution . . . . the United States can accept the majority of the Covenant’s obligations and undertakings without qualification . . . . [Executive suggestions are] to ensure that the United States can fulfill its obligations under the Covenant in a manner consistent with the United States Constitution, including instances where the Constitution affords greater rights and liberties . . . .").

96. See, e.g., Paust, supra note 5, at 571-610 (providing a general guide to such rights).
basic human rights not documented elsewhere in the Bill of Rights (or in the Constitution more generally), and whether or not conceptually such basic rights reflected in the Covenant are "self"-executing because of the Ninth Amendment's preemptive recognition that they are "retained by the people" or are executed actually through the Ninth Amendment, it seems that the Executive policy of "non-self-execution" smacks of unconstitutional impropriety, could play havoc with the guarantees of the Ninth Amendment, and could ultimately be unconstitutional in operation. This can all be avoided, of course, if in actuality there is to be no denial or disparagement of such basic human rights. Thus, the Ninth Amendment compels one to understand and apply the "non-self-execution" policy in a constitutional sense, i.e., that nothing contained therein is meant to or can be used to deny or disparage basic human rights protected by the Ninth Amendment whether or not such rights are executed because of or by that amendment. The human right to an effective remedy in domestic tribunals is such a right. Thus, ultimately a constitutional read of the "non-self-execution" policy (even assuming that it is not recognizably void ab initio) might recognize that "the Covenant" itself does not directly "create a private cause of action," but the right to an effective remedy in our tribunals is nonetheless guaranteed by or through the Ninth Amendment and such a right cannot be denied or disparaged.

Of further interest is the fact that several federal statutes can serve an "executing" function whether or not the Covenant is recognizably self-executing. With respect to alien plaintiffs, the Alien Tort Statute already provides such an executing function. For U.S. plaintiffs, if not others, various civil rights statutes which have


98. See, e.g., Paust, supra note 97, at 265; Paust, supra note 5, at 611-25 (discussing the right to an effective remedy guaranteed by federal and international law, including the Ninth Amendment).

99. SENATE COMM. ON FOREIGN RELATIONS, supra note 1, at 19, reprinted in 31 I.L.M. at 657.


101. See, e.g., Paust, supra note 20, at 369 (stating that the Alien Tort Statute serves an "executing" function); Paust, supra note 5, at 627-28, 638-43 (same in practice). The statute helps the United States to fulfill an obligation under customary international law to avoid a "denial of justice" to aliens. See id. at 615-16 & n.479. Justice demands similar protections for U.S. citizens.
a purpose to protect human rights can also serve in that capacity, and even certain criminal statutes may indirectly provide the right to a civil action for damages with respect to certain deprivations or prohibitions. Other congressional legislation having a purpose to protect individual rights that are recognizably based in international law can serve a similar "executing" role with respect to certain rights. For example, the recent Torture Victim Protection Act should function similarly for U.S. plaintiffs with respect to claims against certain foreign defendants concerning torture or extrajudicial killings. Indeed, a preambular portion of the Act contains the express purpose:

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

In any event, it is certainly appropriate for a court to seek to serve a stated legislative purpose; and when that purpose includes the preservation, protection, and/or promotion of human rights, it is both rational and proper to look to human rights law in aid of interpretation and application of the legislation. Human rights law can provide useful criteria and content for judicial discovery and use. This is especially so when documented human rights are sufficiently particularized to aid in setting boundaries to shared meaning or to give a richer, more detailed content.

Additionally, since the "declaration" appears to be legally inoperative ab initio because it is unavoidably and fundamentally incompatible with the object and purpose of the treaty, it would certainly be appropriate for the new president, as a matter of Executive policy, to change the non-self-execution policy. Efforts should be made to persuade President Clinton to abandon such an awkward policy and to adopt one more realistically serving of human rights and, thus, one more consistent with overall U.S. policy. Whether or not this is achieved, the U.S. Senate should also abandon the non-self-execution "declaration." Since the "declaration" appears to be

102. For examples of such statutes, see Paust, supra note 5, at 567 & n.163, 598 & nn.380-81, 383-84.
103. See, e.g., Paust, supra note 20, at 369 (noting that civil causes of action can be derived from the federal criminal statutory scheme).
105. See supra notes 43-44 and accompanying text (a declaration incompatible with the purpose of the treaty cannot lawfully take effect).
legally inoperative *ab initio*, the Senate might unilaterally (e.g., by use of a sense-of-the-Senate resolution) recognize such a fact and declare its abandonment of the non-self-execution "declaration." And if the "declaration" were somehow thought to constitute a valid reservation to the treaty, the president and Senate should act to withdraw such a reservation, thereby allowing the United States to comply with its other obligations under international law concerning human rights. Indeed, neither the president nor the Senate can authorize violations of international law and the unavoidable clash which might otherwise be set up between a supposedly valid "declaration"-reservation to the Covenant concerning "non-self-execution" and peremptory norms under the U.N. Charter and customary *jus cogens* clearly must result in adherence to the latter norms. Thus, even if the "declaration"-reservation were otherwise valid, the latter norms must necessarily prevail at the international level, and the president and Senate should withdraw such a reservation in order to avoid an unwanted and ultimately unnecessary embarrassment to the United States.

If such is not withdrawn voluntarily, international institutions such as the International Court of Justice and foreign governments desirous of assuring protection for their nationals might press the matter or assure more formally that it is declared to be void *ab initio*. Such efforts of foreign governments might even occur in our courts and, ultimately, should prevail. Further, under Article 41 of the Covenant, it is open to any State party to the Covenant which has recognized the competence of the Human Rights Committee monitoring compliance with the Covenant to receive State party claims to bring its claim to the Committee that the U.S. non-self-execution policy is void *ab initio*. This is so because, in accordance with Article 41, the United States has recognized the competence of the Committee to receive and consider State party claims that another State party is not fulfilling its obligations under the

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106. But see supra notes 43-44 (suggesting that such a reservation should not be able to lawfully take effect).
107. For a discussion concerning such a procedure, see Frankowska, *The United States Should Withdraw*, supra note 44, at 143-48.
108. Customary international law is also the supreme law of the land. See, e.g., supra note 42.
109. See supra note 62.
110. See supra notes 64 & 79 and text accompanying note 83.
111. See supra note 62 and text accompanying notes 64-65.
CONCLUSION

Rarely has a treaty been so abused. Someday most will understand that the attempted non-self-execution policy is far worse than abnegative and absurd; it brings serious dishonor to the United States and should be abandoned. A country which, however imperfectly, has stood for centuries as a beacon for human rights suddenly would dim their efficacy within its very borders. Perhaps the policy arose out of some misplaced protectionist attitude or simply out of an effort to cut back federally protected rights or to gut human rights treaties of any meaningful effect in the United States, but the treaty predictably will continue to have a growing

112. See Senate Comm. on Foreign Relations, supra note 1, at 23, reprinted in 31 I.L.M. at 659 (stating in Declaration no. 3 "that the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communication under Article 41 in which a state party claims that another state party is not fulfilling its obligations under the Covenant"). I agree with Professor Newman that the Committee might take up this matter as soon as the United States attempts to come before or sit on the Committee. Newman, supra note 3.

113. See Damrosch, supra note 28, at 515 ("neo-isolationist preferences"); Henkin, supra note 33, at 21 (isolationism); Hurst Hannum, Remarks, id. at 40 ("hypocritical paranoia").

114. See Senate Comm. on Foreign Relations, supra note 1, at 18, reprinted in 31 I.L.M. at 656-57 (finding "no intent . . . to 'federalize' matters now within the competence of the States," but "the U.S. will implement its obligations under the Covenant by appropriate means, federal or state as appropriate," and "the Covenant will apply to state and local authorities . . .") (emphasis added); Buergenthal, supra note 18, at 222-23, 228 (discussing the Senate's concerns about federalism); Damrosch, supra note 28, at 519 (describing the Carter Administration's attempt to deal with Senators adverse to infringing state's rights); Rovine, supra note 37, at 59-60 ("Many Senators feel very strongly . . . that human rights is not a proper subject for the treaty power . . . Such matters can and should be dealt with by local communities, towns and cities, states, and even by the federal government."); Stewart, supra note 18, at 1184 (stating that it is a fact that there was a "persistent thread of hostility" to ratification in the Senate). Of course, if ducks can be protected by a treaty, as they were in Missouri v. Holland, 252 U.S. 416 (1920), so can human beings.

115. See Implementation of the Helsinki Accords: Hearings Before the Comm. on Sec. and Cooperation in Europe, 100th Cong., 2d Sess. 10 (1988) (statement of Richard Schifter), reprinted in Lillich, supra note 40, at 224 ("Since the early 1950s, there has been a significant amount of sentiment in this country against dealing with human rights issues through multilateral treaty . . . opposition in the Senate to international human rights treaties is strong enough . . ."); Damrosch, supra note 28, at 519 (discussing the proposal of non-self-executing status in order to increase the probability of passage); Jack Goldklang, Remarks, in U.S. Ratification of the Human Rights Treaties, supra note 33, at 64 (stating that if the Covenant were self-executing, "then we would have a legal nightmare. First, we would have our state laws, local laws, and federal laws. Second, the courts would have to try to interpret how this other body of long and complicated treaties fits in. If the treaties were law, . . . we would have to be twice as careful . . ."); Riesenfeld & Abbott, supra note 38, at 600 (describing the effort of some to obviate the treaty power by denying self-execution); Wedgwood, supra note 4, at 139-40 (discussing the reluctance of some to ratify the Covenant in a form which could make it directly binding as the law of
normative influence, supplementing and conditioning constitutional and statutory law in ways protecting of human rights.

In the meantime, efforts should be made in order to assure that the non-self-execution policy is abandoned. If the president or Senate does not do so, predictably our courts or other institutions might be utilized in order to obtain formal recognition that the policy is legally void ab initio. For any of several reasons addressed above, such a formal recognition should not be difficult to obtain. The non-self-execution policy is not only incompatible with the preamble to and several articles in the Covenant and with the overall object and purpose of the treaty, but also with the very notion of human rights as real and effective rights of real human beings. Additionally, it is incompatible with peremptory norms under the U.N. Charter and customary jus cogens. For this reason also, and as a matter of international law, the non-self-execution policy cannot prevail. And I will go this far — as long as the policy remains, so long is there proof that in this instance our government is not functioning as one of, by, and for, the people of the United States. Certainly it is not in our interest to deny to ourselves and our posterity the rights of human beings.

If these were not sufficient reasons for abandoning the policy, it is evident that non-execution of basic human rights is at odds with the Ninth Amendment to the U.S. Constitution and, depending upon the rights at stake, possibly other amendments which restrain Executive power. Consequently, an attempted non-execution policy with respect to human rights is unavoidably unconstitutional in character and effect and must not be pursued under the guise of “non-self-execution.” Further, because of such constitutional guarantees, the courts must interpret the policy (even assuming its survival) in a constitutional sense — i.e., so as not to allow the denial or disparagement of any human right protected by or under the Constitution.116 The human right to an effective remedy in domestic tribunals is such a right. Additionally, the president and Senate cannot deprive the judiciary of its constitutional authority. Non-self-execution of human rights that are otherwise directly incorporable would attempt to do just that and, as a matter of separation of powers,

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116. When courts play their necessary role, let us celebrate the defeat of non-execution, the triumph of our Ninth Amendment, of justice, humanity, and remedies for wrong.
must not be allowed. Such an impermissible interference with judicial authority pertains especially with respect to the human right to an effective remedy in domestic tribunals.

Or what man is there of you, whom if his son ask bread, will he give him a stone?

Matthew 7:9

117. The judiciary cannot be deprived of its constitutional authority. See supra notes 46-57 and accompanying text.
118. See Paust, supra note 5, at 609, 611-28, 644; supra note 49 and accompanying text.